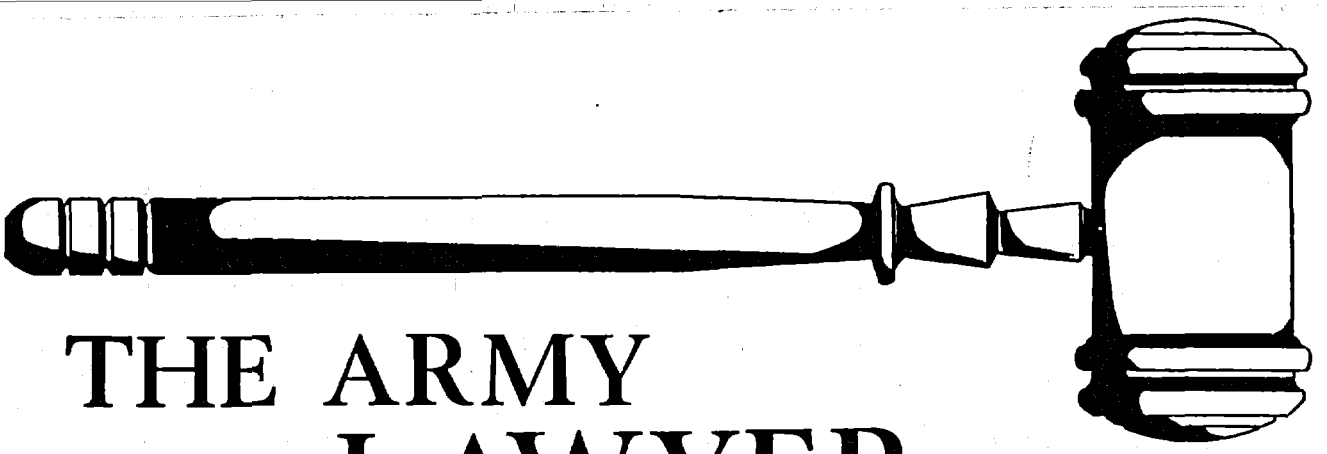

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Legal Aspects of Terrorism: An Overview

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I. Introduction

There is no federal law of terrorism in the sense of federal statutes specifically applicable to terrorism[1] or a developed federal common law of terrorism. There are, however, numerous governmental policies which directly or indirectly affect how the Army prepares for and responds to acts of terrorism. These policies are found principally in readily available published guidance, *e.g.*, Department of Defense (DOD) directives and Department of the Army (DA) regulations.

The DOD's principal responsibility in the area of terrorism is to protect its personnel, equipment, and facilities from a terrorist attack.[2]

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[1]Sixteen states have enacted legislation to deal with terrorism or terrorist threats: Arkansas, California, Delaware, Georgia, Hawaii, Iowa, Kansas, Maine, Michigan, Minnesota, New Hampshire, North Dakota, Pennsylvania, Tennessee, Texas, and Utah.

[2]Dep't of Defense, Directive No. 2000.12, Protection of DoD Personnel and Resources Against Terrorist Acts, para. D.1 (Feb. 12, 1982) [hereinafter cited as DOD Dir. 2000.12]; Dep't of Army, Reg. No. 190-52, Countering Terrorism and Other Major Disruptions on Military Installations, para. 1-6 (July 15, 1983) [hereinafter cited as AR 190-52].

Such protection involves both antiterrorism, *i.e.*, defensive measures used by DOD to reduce the vulnerability of its personnel and their dependents, facilities, and equipment to terrorist acts, and counterterrorism, *i.e.*, offensive measures taken in response to a terrorist incident. A second, somewhat more limited DOD responsibility is to render support to antiterrorist and counterterrorist efforts of other federal agencies and state and local governments.[3] It is in this latter context that most questions concerning the applicability of the Posse Comitatus Act[4] and related statutes arise.

To meet these responsibilities, DOD has adopted a four-pronged approach: prevention, deterrence, prediction, and response.[5] Prevention entails discouraging terrorist activity through diplomatic means such as dissuading state support for international terrorists by imposing sanctions and a "no concession" policy, *i.e.*, the United States will not succumb to terrorist demands. Deterrence centers on personal protection and physical security measures. Prediction is the collection, acquisition, analysis, and dissemination of intelligence about individuals and groups that pose a threat to the security of US installations and personnel. Response involves the full range of diplomatic, political, economic, and military measures that are available and may be utilized to contain and resolve a terrorist incident. Each of these elements is an essential part of the Army's program to combat terrorism.

Terrorism invariably involves a criminal component, but it also may be a form of civil disturbance.[6] Thus, by approaching any terrorism issue as one dealing with criminal conduct and/or a civil disturbance, most legal problems can be analyzed within a known framework.

Although there are numerous definitions of "terrorism," DOD has defined "terrorism" as "[t]he unlawful use or threatened use of force or violence by a revolutionary organization against individuals or property, with the intention of coercing or intimidating governments or societies, often for political or ideological purposes."[7]

DOD differentiates terrorism from other unlawful conduct by its focus upon the identity of the actors (revolutionary organizations) *and* their intention (governmental/societal intimidation or coercion). Thus, a bank robbery perpetrated by a revolutionary organization simply to fund its other revolutionary activities, without more, would not constitute terrorism under the DOD definition because the unlawful act, *i.e.*,

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[3] *Id.*

[4] 18 U.S.C. § 1385 (1982).

[5] *Department of Defense Appropriations for 1982, Part 6*, 97th Cong., 1st Sess. 641 (1981) (statement of LTG Phillip C. Gast, USAF).

[6] *See, e.g.*, Dep't of Defense, Directive No. 3025.12, Employment of Military Resources in the Event of Civil Disturbances (Aug. 19, 1971) [hereinafter cited as DOD Dir. 3025.12].

[7] DOD Dir. 2000.12, para. C.2. *Cf.* AR 190-52, Glossary. *See also* AR 190-52, paras. 1-4*c*, *g*(3) and *h*(12), 1-6, 4-1 and 4-2.

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robbery, does not have the requisite intimidating or coercive intent. If, however, that same organization took hostages during a robbery so as to secure the release of their previously imprisoned brethren, the taking of hostages for that purpose would constitute a terrorist act under the DOD definition.

A framework for analyzing terrorism necessarily requires that each of DOD's responsibilities be considered: antiterrorism, counterterrorism, and assistance to civil authorities. For ease of analysis, each of these responsibilities will be discussed *seriatim.*

II. Antiterrorism

DOD Directive 200.12, Protection of DoD Personnel and Resources Against Terrorist Acts, and the implementing Army regulation, AR 190-52, Countering Terrorism and Other Major Disruptions on Military Installations, constitute the principal guidance in this area. DOD Directive 2000.12 states several key policies:

1. DOD personnel, their dependents, facilities, and equipment are to be protected to the best of its ability from terrorist acts. Particular attention is to be given to "high risk targets" (*e.g.*, key DOD personnel and nuclear weapon sites) that are considered to be "especially vulnerable" to terrorist acts.
2. Permanently assigned and temporary duty personnel are to be kept informed of the local terrorist threat, security measures to protect them and how they can reduce their personal vulnerability.
3. Actions and procedures are to be coordinated at the national and field levels with the Department of State, the Department of Justice (DOJ), other government agencies and host governments, as appropriate.
4. Protective plans and procedures should reflect a balance between mission requirements, the degree of protection desired and available resources.
5. Information relating to terrorism and terrorist activities is to be acquired and disseminated under DOD Dir. 5240.1, Activities of DoD Intelligence Components that Affect United States Persons.[8]

These policies have resulted in the identification of staff responsibilities within DOD down to and including the Army Chief of Staff. At the DA level, similar responsibilities have been assigned at the headquarters and commander level.[9]

The first step to effectively countering terrorist activities and protecting DOD personnel and their dependents, facilities, and equipment is to implement adequate preventive security measures.[10] Such concerns require attention to physical security,[11] operational security,[12] and personal security.[13] As no preventative security

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[8]DOD Dir. 2000.12, para. D.

[9]AR 190-52, para. 1-4.

[10]Congress has been especially sensitive to the need to upgrade security measures in an efficient, cost effective manner. *See Physical Security at U.S. Military Bases: Hearings Before the Subcommittee on Investigations of the House Comm. on Armed Services*, 97th Cong., 1st Sess. (1981).

[11]In analyzing what physical security measures are needed and to implement those measures, key references are Dep't of the Army, Reg. No. 190-31, Department of the Army Crime Prevention Program (Jan. 1, 1982) and Dep't of Army, Reg. No. 190-13, The Army Physical Security Program (Aug. 23, 1974).

[12]Operational security includes those measures taken to keep potential terrorists from getting information that could aid them in performing a terrorist operation. *See* Dep't of Army, Reg. No. 530-1, Operations Security (OPSEC) (May 1, 1978).

[13]Dep't of Army, Pamphlet No. 190-52-1, Personnel Security Precautions Against Acts of Terrorism (Nov. 1, 1983), provides useful guidance on specific personal security techniques. *See also* Dep't of Army, Reg. No. 1-4, Employment of Department of the Army Resources in Support of the United States Secret Service (Oct. 1, 1979); Dep't of Army, Reg. No. 10-23, United States Army Criminal Investigation Command (Apr. 15, 1981); Dep't of Army, Reg. No. 190-10, Security of Government Officials (Oct. 20, 1977); Dep't of Army, Reg. No. 190-30, Military Police Investigations (June 1, 1978); and Dep't of Army, Reg. No. 210-10, Installations-Adminsitration (Sept. 12, 1977) [hereinafter cited as AR 210-10].

system is perfect or foolproof, advance planning to meet a terrorist threat is an essential ingredient of antiterrorism.

At the DA level, the Deputy Chief of Staff for Personnel has been assigned primary staff responsibility for developing policies and procedures to combat terrorism and other major disruptions on military installations.[14] The Chief of Public Affairs has primary responsibility for providing public affairs guidance and for authorizing local responses to news media inquiries concerning counterterrorism.[15] The Training and Doctrine Command is responsible for developing specialized training programs, doctrine, material, and command guidance,[16] and for drafting a model contingency plan.[17] Commanders at all levels are to establish contingency plans and to designate specific responsibilities of staff personnel for coping with special threats, including terrorist incidents.[18]

III. Counterterrorism

Adequate planning to fulfill antiterrorism requirements necessitates a familiarity with and understanding of permissible counterterrorism measures, *i.e.*, what actions can be taken to counter a terrorist threat. Two key issues in the analysis of this areas are who wields what authority when and where, and what is the permissible scope for gathering counterterrorist information.

Authority

In considering who has what authority, it is important to determine where the terrorist incident occurs. Important differences exist depending on whether the terrorist incident occurs on or off post and whether it occurs within the United States or overseas.[19] Although the Department of State has primary United States responsibility for dealing with terrorism abroad,[20] the host country government has overall responsibility for combating and investigating terrorism within its borders.[21] The remainder of our discussion will focus on domestic terrorism, *i.e.*, terrorist incidents that occur within the continental United States.

Domestically, the FBI has been given overall federal jurisdictional responsibility at the scene of a terrorist incident wherever it occurs, including military installations.[22] Although this delineation of federal responsibility is clear, a far less distinct demarcation exists when state or local law enforcement officials also have jurisdiction over the incident. Where concurrent jurisdiction exists, the FBI is to coordinate the federal effort with these authorities. What this coordination actually will entail, however, may be subject to wide variances depending on the location of the incident. Moreover, the success of such an endeavor is obviously problematic and can create additional legal problems. This gray area may well be the price we must pay for a government based upon limited federal powers. Suffice it to say that problems caused by overlapping jurisdiction have been identified as the principal unresolved question concerning the FBI's role in counterterrorism, an issue that many have viewed with considerable concern.

Although the FBI may have overall federal responsibility in responding to a domestic, on-post terrorist incident, this should not be viewed as usurping the installation com-

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[14]AR 190-52, para. 1-4*a*.

[15]*Id.* at para. 1-4*d*.

[16]A conceptual overview of the Army's role in counteracting terrorism is found in U.S. Army Training & Doctrine Command, Pamphlet No. 525-37, US Army Operational Concept for Terrorism Counteraction (Mar. 19, 1984). This document explains the Army's interrelated roles in intelligence, law enforcement, command and control, and the employment of force to resolve terrorist incidents.

[17]AR 190-52, para. 1-4*e*.

[18]*Id.* at para. 1-4*f*. Detailed guidance for developing these plans can be found in AR 190-52, chapter 2, and in Dep't of Army, Training Circular No. 19-16, Countering Terrorism on US Army Installations (Apr. 1983). In addition, CONUS commanders are to seek, subject to the applicable SOFA, host country cooperation in delineating areas of responsibility and in coordinating terrorist reaction plans with host country officials and with Department of State representatives. AR 190-52, para. 1-4*i*.

[19]A matrix summarizing these differences is provided at Appendix A.

[20]AR 190-52, para. 1-5*a*.

[21]*Id.* at para. 1-5*c*.

[22]*Id.* at paras. 1-5*c*, 4-1*a*.

mander's authority, particularly during the initial response phase of a terrorist incident. After all, "the authority of an installation commander to take such steps, as are reasonably necessary and lawful, to maintain law and order and to protect installation personnel and property has long been recognized."[23] and "the authority of the commander to enforce military law is clear and unequivocal."[24] Clearly, the installation commander has the authority and the responsibility to take all reasonably necessary steps to isolate, contain, and neutralize (if the situation dictates) an on-post terrorist incident during the initial phase before the FBI response team arrives at the scene.[25]

A question may arise as to whether the FBI will exercise its overall responsibility in combating terrorism on post. For example, it may be unclear whether the incident is, in fact, an act of terrorism. If the FBI special agent-in-charge concludes from the available facts that terrorist activity has occurred or is occurring, the commander should accept that determination. Although there is no affirmative requirement that the installation commander submit to overall FBI control in questionable cases, the overriding Army policy is to work with the FBI. Thus, a useful rule of thumb is that unless the incident clearly does not constitute terrorism, the commander should allow the FBI special agent-in-charge to exercise overall responsibility for the incident. In the event the FBI assumes control, it should be emphasized that actual command and operational control of troops remains with the military commander.[26]

The recently executed Memorandum of Understanding (MOU) between the Department of Defense, the Department of Justice, and the Federal Bureau of Investigation significantly clarified the respective duties and responsibilities between and among these agencies.[27] For example, the MOU makes clear that

- The Attorney General is responsible for managing the federal response and coordinating *all* federal government activities;
- The Director of the FBI has overall responsibility for ongoing operations to contain and resolve the incident;
- The Attorney General will determine the law enforcement policies to be followed by all federal activities. If a revision or elaboration of these policies is required during actual military operations, these will be referred to the Attorney General, military exigencies permitting;
- All military preparations and operations are the responsibility of the Secretary of Defense and they will be carried out principally through the Secretary of the Army as the DOD executive agent;
- The initial tactical response is to be made by the FBI special agent-in-charge (SAC);
- In responding to the early stages of an off-post incident, the Department of Justice (DOJ) will notify DOD if there is a potential for military involvement. During this phase military observers may be dispatched (upon mutual agreement between DOD and FBI), contingency plans may be developed, civilian officials may be advised, specialized equipment may be loaned, and troops may be prepositioned;
- Although the Attorney General has authority to request military assistance off post, military forces will not be committed without presidential approval;
- The Attorney General will coordinate with state and local agencies;
- During the tactical phase, operational responsibility is transferred to the

[23]Dep't of Defense, Directive No. 5200.8, Security of Military Installations and Resources, para. C (July 29, 1980).

[24]AR 190-52, paras. 2-8*c*, 4-1*a*. *See also* AR 210-10, para. 2-9.

[25]AR 190-52, para. 4-1*b*.

[26]*Id.* at para. 4-1*b*(4).

[27]A copy of the Memorandum of Understanding is provided at Appendix B.

military commander by the SAC. The SAC may revoke the commitment of military forces at any time prior to the assault phase, provided that a withdrawal would not seriously endanger military or other personnel;

- FBI personnel may be utilized by the military commander, *e.g.*, as snipers, observers or in other support roles, but may not participate in the tactical assault unless expressly authorized by the SAC;
- On post, the installation commander is responsible for taking immediate action to protect life and property and for maintaining law and order;
- Merely because a terrorist incident occurs on post does not necessarily mean that the FBI/DOJ will exercise their overall responsibilities. Rather, the FBI will exercise such jurisdiction only if the Attorney General or his designee determines that the incident is a matter of "significant federal interest" (an undefined and perhaps undefinable concept). If the FBI declines jurisdiction, military authorities will take appropriate action to resolve the incident.

Clearly, the Memorandum of Understanding will greatly assist commanders in the United States to more clearly understanding their scope of responsibility and authority when responding to a terrorist incident. It will not resolve, however, all questions that may arise.

At the outset of an on-post terrorist incident, the installation commander is authorized to take those measures necessary to protect life and property and to maintain law and order until it is decided that the incident does or does not possess a "significant federal interest." Until that time, control, authority and responsibility rests with the installation commander; but this power is circumscribed and does not extend to resolving the incident (unless dictated by the situation to prevent loss of life or to mitigate property damage). Even if an FBI agent were present at the installation, the agent would have no authority to control or direct the commander's activities until a determination has been made that the incident involves a "significant federal interest." Obviously, the memorandum contemplates a quick determination by the FBI whether or not to assume jurisdiction.

Although unstated, it would appear consistent with the basic policy expressed in the MOU that even if the Attorney General (or his designee) initially declined jurisdiction, subsequent circumstances or new information could cause the incident to become a matter of "significant federal interest." If so, the Attorney General could properly assume jurisdiction over the incident. Although an incident theoretically could result in repeated assumptions and declinations of FBI responsibility, it is far more likely that the agency that first assumes responsibility over the incident will continue in that role until the matter is finally resolved.

In the event the FBI declines jurisdiction over an on-post incident, the installation commander will be responsible for its resolution. If state or local officials also have authority to act on the installation, *e.g.*, concurrent jurisdiction, or if they lack such authority, *e.g.*, exclusive federal jurisdiction, but wish to participate to protect their concerns in the matter, the commander will, of necessity, be involved in coordinating with these officials in an effort to accommodate their differing but complementary interests.[28] The legal advisor should be sensitive to these practical problems as they may affect the appropriateness of various military actions. It is possible that a given on-post terrorist incident could give rise to federal, state, and local involvement, depending on the legislative jurisdiction of the installation or the part of the installation where the incident occurs. In such a situation, the commander may be confronted with local police, county police, state police, FBI agents, and the National Guard (acting in its state capacity). Politically sensitive access and operational issues might well arise in such a setting, underscoring the importance of adequate advance planning. The emotionally charged at-

[28] *Cf.* DOD Dir. 3025.12, para. VI.E.; Dep't of Army, Reg. No. 500-50, Civil Disturbances, para. 3-3*a* (Apr. 21, 1972).

mosphere that exists when responding to a terrorist incident is not the best time to resolve such matters.

It should be remembered that the commander's overall authority flows in large measure from his or her inherent authority to maintain law and order on the installation, as exemplified and discussed in *Cafeteria & Restaurant Workers v. McElroy*,[29] and *Greer v. Spock*.[30] In most cases dealing with this authority, no distinction has been drawn between exclusive and concurrent jurisdiction. Moreover, many cases recognize that the commander possesses broad authority to determine who may come on the installation,[31] and it is well settled that violations of the commander's lawful orders concerning access to the installation are punishable under the federal trespass statutes.[32] Thus, even if a terrorist incident occurs in an area of concurrent jurisdiction, an area within which state and local officials have the authority (if not the responsibility) to act, the commander might validly determine that presence of the state and local officials so threatens the effective exercise of his or her authority to maintain law and order that he or she may deny them access to or evict them from the installation.[33]

Based on the availability of assets and the immediacy of the danger, the commander may not wish to deny access to state or local officials, *e.g.*, local SWAT teams or state National Guard personnel. Instead, he or she may want them to assist in resolving the incident. An important legal issue might then arise: in what capacity would these individuals be acting? This could be significant when sorting out subsequent civil lawsuits and criminal prosecutions.

In analyzing this issue of capacity, it may be useful to draw a distinction based on whether the incident occurs on an exclusive federal enclave or an area of concurrent or proprietary state jurisdiction. While on the exclusive federal enclave, state and local officials would be without state authority to act, except to the extent that they can exercise the arrest authority of private citizens.[34] For operational or security reasons, the commander might determine that state and local resources should actively assist in resolving the incident, *e.g.*, as part of the assault force. If this were to occur, the Department of Justice may later decline to represent such state and local officials in subsequent civil litigation and may argue that they are neither federal agents nor entitled to a qualified immunity under the Federal Torts Claims Act.[35] To avoid the possibility of deterring necessary state or local assistance, advance planning is essential. For example, insurance arrangements or indemnification agreements might be considered as possible devices to allay such legitimate concerns,[36] but such solutions may require coordination with and approval by higher headquarters, making them unviable alternatives if first considered after a terrorist incident occurs.

If the terrorist incident occurs in an area of concurrent or proprietary state jurisdiction, no capacity issue would arise because state or local law enforcement personnel clearly would have the requisite authority to act. For operational reasons, the commander may believe it is necessary as a condition to entry upon the installation that they accept his or her overall

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[29]367 U.S. 886 (1961).

[30]424 U.S. 828 (1976).

[31]For example, it has been opined that installation commanders can validly restrict access to public highways traversing military installations. DAJA-AL 1982/2479, 24 Aug. 1982, *digested in* The Army Lawyer, Apr. 1983, at 21.

[32]18 U.S.C. § 1382 (1982); 50 U.S.C. § 797 (1982). *See also* Dep't of Defense, Directive No. 5200.8, Security of Military Installations and Resources (July 29, 1980); Dep't of Army, Reg. No. 380-20, Restricted Areas (Mar. 15, 1982).

[33]The federal government and its military forces have the constitutional authority in certain emergency situations to protect life and the wanton destruction of property. Query: Do state and local governments have similar emergency authority to act on the federal enclave? Logic says yes, but, again, there are no clear answers.

[34]DAJA-AL 1981/3267, 31 July 1981.

[35]DAJA-AL 1983/1468, 28 Jan. 1983, *digested in* The Army Lawyer, Feb. 1984, at 47.

[36]*But cf.* DOD Authorization Act, 1983 Pub. L. No. 97-252, § 1111, 96 Stat. § 718 (1982).

authority. If they agree to this arrangement, state or local law enforcement officials may then be acting in both a state and a quasi-federal capacity as the commander's agents. Resultant civil liability for their actions may then attach to the United States.[37] It bears repeating that few hard and fast rules exist to answer all the legal questions that may arise when interfacing with state and local officials to resolve an on-post terrorist incident, especially if the FBI declines jurisdiction over the matter. Accordingly, a premium must be placed upon thorough advance planning.

Intelligence/Information Gathering

It also bears repeating that domestically it is the FBI that has been accorded primary federal responsibility concerning terrorism. As a corollary, the FBI is also the lead federal agency for acquiring terrorist information and intelligence. Although the military services also play an important role in this process, it is neither their duty nor their responsibility to do that which has been entrusted to the FBI.

The responsibility for collecting, examining, interpreting, and disseminating such information and intelligence falls upon several government agencies, each of which must act within the permissible bounds of its respective charter. Within DA, specific responsibilities have been assigned to the Assistant Chief of Staff for Intelligence (ACSI), the Intelligence and Security Command (INSCOM), the Criminal Investigation Division (CID), and to commanders at all levels.[38] INSCOM, however, is the lead DA agency for *all* Army intelligence activities (both foreign and domestic) that may be directed against terrorists and terrorist acts. Collecting information on threats against Army installations and personnel is an INSCOM responsibility that must be carried out in conformance with AR 380-13 and AR 381-10.[39] In addition, the Intelligence and Threat Analysis Center (ITAC), an INSCOM agency, receives reports from supporting activities and federal, state, and local agencies, provides current intelligence data concerning terrorist groups and invdividuals, and disseminates specific threat warnings to the appropriate commands.[40]

CID detachments, intelligence staff elements, other law enforcement personnel, and installation security officer all act to support INSCOM in carrying out its responsibilities. For example, CID investigates terrorist incidents and provides terrorist-related criminal information to INSCOM. Law enforcement personnel and intelligence staff elements are required to report all actual or suspected terrorist incidents or activities to ITAC. In this manner, information from supporting elements is funneled to INSCOM, analyzed, and appropriate threat warnings issued to the field.

Clearly, a well-planned, systematic, all-source intelligence program is an essential ingredient of effective counterterrorism planning and operations. Although commanders at all levels have been directed to collect and analyze information concerning local terrorist elements that pose a direct threat to the Army,[41] care should be exercised in fulfilling this responsibility lest local command activities go beyond support and transgress the lead DA role played by INSCOM. The mandates of AR 190-52 should not be interpreted as granting local commands, *carte blanche* authority to independently conduct intelligence gathering activities.[42] Instead, local

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[37]To avoid having them act in a federal capacity, the commander might seek to have the state/local forces request to come on post. In such an event, the argument might then be that the commander 'aquiesced'' in their request and that they are mere federal licensees. Although this may have civil liability advantages, it might complicate criminal prosecutions and could detract from the commander's authority to exercise command and control over such resources.

[38]AR 190-52, para. 1-4.

[39]*Id.* at para. 1-4*g*(3).

[40]*Id.* at para. 1-4*g*(1).

[41]*Id.* at para. 1-4*h*(12).

[42]AR 190-52, para. 1-4*h*(12), makes clear that the commander's duty to acquire relevant terrorist information is subject to the restrictions of AR 380-13 and AR 381-10. *See also* Dep't of Army, Field Manual No. 19-15, Civil Disturbances, para. 7-18*a* and HQDA, DA Civil Disturbance Plan (Garden Plot), Annex B (Mar. 1, 1984). Numerous information gathering activities are prohibited outright and several others require HQDA approval. Dep't of Army, Reg. No. 380-13, Acquisition and Storage of Information Concerning Nonaffiliated Persons and Organizations, para. 9

commanders should direct their commands to give full support to maintaining and maximizing the existing liaison relationships with INSCOM elements. Moreover, they should rely on INSCOM personnel to conduct such activities. In this manner, the commander can not only satisfy his or her important command responsibilities, but also support fully US Army intelligence activities.

IV. Military Assistance

Quite obviously, the issue of employing military forces to resolve an on-post terrorist incident poses few major legal issues.[43] The focus of the problem is rendering military assistance to civil authorities off post. A key to understanding *how* this may be accomplished is the Memorandum of Understanding between DOD, DOJ, and the FBI. An equally important question is *whether* this will be accomplished. It is to this latter issue that we now turn.

The limitations on utilizing military forces off post emanate from the Constitution, the Posse Comitatus Act (Act), and related statutes. These concepts are well understood and do not require extensive reevaluation here.[44] Clearly, if the President directs the use of forces under 10 U.S.C. §§ 331-333 to quell an insurrection, the military will respond and the Act will not have been violated.[45] Thus, the greatest concern in responding properly to off-post terrorist incidents is the Act's constitutional exceptions:[46] emergency authority and the protection of federal property and functions. Each of these exceptions is discussed in DOD Directive 3025.12 and the circumstances under which military resources will be employed off post are outlined. Because terrorist incidents may also be defined as a form of civil disturbance, the same rules and policies outlined in that directive should apply equally in most terrorist scenarios.[47]

DOD Directive 3025.12 states that the "emergency authority" exception

> authorizes prompt and vigorous Federal action, including the use of military forces, to prevent loss of life or wanton destruction of property and to restore governmental functions and public order when sudden and unexpected civil disturbances, disaster, or calamities seriously

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(Sept. 30, 1974). Necessary approval will not be forthcoming until, *inter alia*, it is established that civil law enforcement agencies cannot or will not furnish the sought for information. *Id.* at para. 6. If approval to perform a special investigation is secured, it is performed by the relevant counterintelligence unit. *Id.* It, in turn, is subject to the limitations contained in Dep't of Army, Reg. No. 381-10, US Army Intelligence Activities (July 1, 1984). *See* DAJA-AL 1981/2144, 29 Jan. 1981.

[43]One issue which might arise is the use of sister service military forces on post (*e.g.*, Navy Seal or Marine units). The issue would be twofold: how does one secure such resources and who controls such resources once they are secured? DA is the DOD executive agent for responding to off-post civil disturbances. Although it could task sister services to render assistance off post, it would not be able to direct that they render similar assistance on post. It would, therefore, appear that DOD would have to direct that such resources be provided and clearly delineate the respective lines of authority to be utilized by such augmentation resources. DOD Dir. 3025.12 applies to rendering assistance to *civil* authorities and to protecting life, federal property, and functions. It is unclear whether it would apply in these circumstances. Even if it does not, it might provide useful guidance on these issues. *See also* AR 500-50, para. 2-8.

[44]*See generally* Furman, *Restrictions Upon the Use of the Army Imposed by the Posse Comitatus Act*, 7 Mil. L. Rev. 85 (1960); Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 Mil. L. Rev. 83 (1975).

[45]10 U.S.C. §§ 331-333 (1982).

[46]A separate statutory exception to the Posse Comitatus Act is found in House Joint Resolution 1292, Pub. L. No. 90-331, 82 Stat. 170 (1968) (assistance to the Secret Service in carrying out its protective duties). These rather unusual powers are not likely to pose a significant problem. Specific guidance can be found in Dep't of Defense, Directive No. 3025.13, Employment of Department of Defense Resources in Support of the United States Secret Service (Aug. 10, 1978).

[47]One should note, however, that this directive does not govern air piracy. A separate memorandum controls in such circumstances. The implementing Army regulation specifically states that military resources are to be used in a support capacity only. Dep't of Army, Reg. No. 500-1, Aircraft Piracy Emergencies, para. 2 (Oct. 2, 1972). Moreover, military personnel may not participate in the apprehension of air pirates nor will its vehicles be used as gun platforms against such suspects. *Id.* at para. 6.

endanger life and property and *disrupt normal governmental functions to such an extent that duly constituted local authorities are unable to control the situation.*[48]

This exceedingly limited constitutional exception to the Act applies only if such forces must be used "to restore governmental functions." Absent the most egregious circumstances, terrorist activities will not threaten "normal" governmental operations. It is almost inconceivable that an installation commander could ever possess the emergency authority to respond to an off-post terrorist incident, *e.g.*, hostage taking at the local Safeway.[49]

As to the protection of federal property and functions, DOD Directive 3025.12 "authorizes federal action, including the use of military forces, to protect Federal property and Federal governmental functions when the need for protection exists *and duly constituted local authorities are unable or decline to provide adequate protection.*"[50] This is also a very limited exception. Rarely will local authorities be "unable" to provide adequate protection. After all, they have not only local resources available, but state resources as well, *e.g.*, state police and, more importantly, the National Guard acting in its state capacity. Moreover, it is difficult to conceive of a situation in which elected state officials with the capability of responding to protect their citizenry would decline to do so.

As a matter of DOD policy, military resources will *not* be used in a law enforcement role to respond to an off-post terrorist threat, absent at least informal presidential approval.[51] This is true even under arguable emergency or protection of federal property or function scenarios. Thus, even if the Army had authority to act without presidential approval, it would not do so. At first blush this may seem unsettling, but upon reflection it is not unreasonable as a practical matter. Within a matter of moments after the installation commander learns of a terrorist incident, the Army Operations Center will be contacted.[52] If a true emergency exists, presidential approval or an exception to DOD policy could be rapidly secured.

It should be clear that the decision to use military forces off post to respond to a terrorist incident will seldom be answered at the local or installation level. In light of DOD's stated policy, there would be virtually no instance in which a commander could properly employ his forces in such situations.[53] Indeed, even the ability of the military commander to respond to on-post incidents at some installations is circumscribed. For example, if the installation is located within an area predominantly under civil rather than military jurisdiction, the commander is admonished to take no action until he or she receives specific instructions through command channels.[54]

Although employing military forces off-post is exceedingly limited by the Posse Comitatus Act, the limited nature of the recognized exceptions thereto, and by government policy, it should be noted that not all manner of military assistance is precluded. For example, the Army is authorized (and in some circumstances encouraged)

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[48]DOD Dir. 3025.12, para. V.C.1.a. (emphasis added).

[49]Admittedly, there may be some situations under which such authority could be exercised properly (*e.g.*, nuclear incidents). However, the magnitude of such an incident would have to be for greater than any terrorist incidents to date, either here or abroad. In an era of almost instantaneous communications, this exception may be a nonissue for the actions of installation commanders. If a terrorist incident were of such a magnitude that it could threaten government functions, it is inconceivable that the President would not be involved or that the White House would not be directing the federal response.

[50]DOD Dir. 3025.12, para. V.C.1.b. (emphasis added).

[51]This basic policy is reflected in the DOD/DOJ/FBI Memorandum of Understanding, section IV, *infra* Appendix B. A somewhat watered down version of this policy is also reflected in AR 500-50, para. 2-4*a*.

[52]AR 190-52, para. 1-7.

[53]*But cf.* AR 500-50, para. 2-4*a*.

[54]AR 500-50, para. 2-8*h*. Although this paragraph also requires that the commander believe that the use of federal troops would create jurisdictional or sensitive community relations implications before this requirement is triggered, it is difficult to perceive of situations in which such would *not* be the case.

to loan equipment to civil authorities without running afoul of the Act. For example, in *United States v. Red Feather*,[55] state authorities obtained the use of military equipment, *e.g.*, armored personnel carriers, to aid in resolving the Wounded Knee incident. The court held that the loan of such equipment was beyond the pale of the Act and that military personnel could be used to maintain such equipment.[56]

In the wake of this litigation and mindful of the perceived vagueness and ambiguity of the Posse Comitatus Act, Congress acted to clarify the issue in 1981 by passing an act entitled, "Military Cooperation with Civilian Law Enforcement Officials."[57] Although largely successful, this recent legislation did not resolve all the confusion that surrounds the Posse Comitatus Act. In fact, it raised some issues that did not previously exist.[58]

Although loaning military equipment is now statutorily recognized and should not present difficulties under the Act in most cases, such assistance is still subject to the limitations contained in DOD Dir. 5525.5. This directive and the implementing Army regulation, AR 500-51,[59] establish uniform policies and procedures for providing support to federal, state, and local law enforcement officials.[60] Care should be exercised to insure that not only the letter but also the spirit of the overriding government policies articulated in AR 500-51 are maintained.[61]

V. Conclusion

The possibility of being subject to a terrorist incident is an ever present threat. As this threat has intensified in recent years, so too has the Army's sensitivity to the threat; necessary policy tools are in place, resources are being made available, and priorities have been established. However, the Army's efforts at countering the terrorist threat as a whole can be no more effective than the effort that occurs at the local level. The local staff judge advocate is an essential participant in antiterrorism program development, counterterrorism planning, and incident resolution. For example, he or she can assist in resolving sensitive jurisdictional questions and in drafting necessary memoranda of understanding. Legal issues concerning the authority of military personnel to apprehend suspected terrorists, to conduct legitimate searches, *etc.*, under a variety of possible scenarios, can be considered and resolved by the local staff judge advocate *before* an incident occurs. By engaging in comprehensive advance planning and by anticipating problems and opportunities, the judge advocate can render timely, accurate legal advice to the commander.

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[55]392 F. Supp. 916 (D.S.D. 1975).

[56]392 F. Supp. at 925. *See also, United States v. McArthur*, 419 F. Supp. 186, 192-95 (D.N.D. 1976), *aff'd sub. nom. United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977); *United States v. Jaramillo*, 380 F. Supp. 1375, 1379-80 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975); *United States v. Banks*, 383 F. Supp. 368 (D.S.D. 1974).

[57]Pub. L. No. 97-86, 95 Stat. 1114 (1981) (codified at 10 U.S.C. §§ 371-378 (1982)).

[58]For a detailed discussion of this legislation and its implications, *see* Hilton, *Recent Developments Relating to the Posse Comitatus Act*, The Army Lawyer, Jan. 1983, at 1; Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 Mil. L. Rev. 109 (1984).

[59]Dep't of Army, Reg. No. 500-51, Support to Civilian Law Enforcement (Jul. 1, 1983).

[60]*See also* AR 1-4; Dep't of Army, Reg. No. 75-15, Responsibilities and Procedures for Explosive Ordnance Disposal (Nov. 1, 1978); AR 500-50; Dep't of Army, Reg. No. 500-60, Disaster Relief (Aug. 1, 1981).

[61]It should be noted that neither equipment nor services are provided without at least an expectation of reimbursement. AR 500-51, para. 4-1. Thus, casual or unnecessary requests for such assistance should be exceedingly rare.

Appendix A

Guide to Jurisdictional Authority for Handling Terrorist Incidents

LOCATION	INITIAL RESPONSE	PRIMARY AUTHORITY/ JURISDICTION	PRIMARY ENFORCEMENT RESPONSIBILITY	EXERCISING CONTROL OF MILITARY ASSETS	PRIMARY INVESTIGATIVE RESPONSIBILITY
Within the United States					
On Post	Military Police	FBI/Post Commander	FBI/Provist Marshall	Post or Unit Commander (Support FBI)	FBI/CID
Off Post	Civilian Police	FBI	FBI	Post or Unit Commander (IAW Posse Comitatus Act)	FBI/Local Authorities
Outside the United States					
On Post	Military Police	Host Government/ Post Commander	Host Government/Provost Marshall	Post or Unit Commander (IAW applicable Status of Forces Agreement	Host Government/ CID
Off Post	Host Country Law Enforcement	Host Government	Host Government	Post or Unit Commander/Host Government (IAW applicable Status of Forces Agreement)	Host Government

Note: Coordinate with Department of State officials as required. Coordinate in advance with local law enforcement agencies to insure support procedures are in place and established information/communications channels are functioning.

Appendix B

MEMORANDUM OF UNDERSTANDING BETWEEN DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE AND THE FEDERAL BUREAU OF INVESTIGATION

SUBJECT: USE OF FEDERAL MILITARY FORCE IN DOMESTIC TERRORIST INCIDENTS.

I. Purpose. This memorandum sets forth the responsibilities of the Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), and the Department of Defense (DOD); and the procedures to be followed by each of these agencies with respect to the use of military force in a domestic terrorist incident. These procedures are based on the Interdepartmental Action Plan for Civil Disturbances, dated April 1, 1969.

II. Responsibilities. The responsibility for the management of the Federal response to acts of terrorism in the United States rests with the Attorney General. As the chief law enforcement officer of the Federal Government, the Attorney General coordinates all Federal Government activities during a major terrorism crisis and advises the President as to whether and when to commit military forces in response to such a situation. Within the Department of Justice the lead agency for the operational response to a terrorist incident is the FBI. The initial tactical response to such incidents is

made by the FBI Special Agent in Charge (SAC) at the scene, under the supervision of the Director of the FBI, who has overall responsibility for ongoing operations to contain and resolve the incident.

All military preparations and operations, including the employment of military forces at the scene of a terrorist incident, will be the primary responsibility of the Secretary of Defense. In discharging these functions, he will observe such law enforcement policies as the Attorney General may determine. To the extent practical, such law enforcement policies will be formulated during the early stages of the terrorist incident to insure that military planning and operations are consistent with Administration policy and the requirements of law.

The responsibilities of the Department of Defense under this memorandum will be carried out principally through the Department of the Army, inasmuch as the Secretary of the Army is assigned primary responsibility for such matters as DOD Executive Agent.

III. Responding to Early Stages of a Terrorist Incident. The Department of Justice will immediately notify DOD when a terrorist incident has occurred with potential for military involvement and will keep DOD advised of developments. The Department of Defense may dispatch military observers to the incident site upon mutual agreement by DOD and FBI to appraise the situation before any decision is made to commit federal military forces. Although the Posse Comitatus Act does not permit military personnel to actively engage in the law enforcement mission unless expressly authorized, the Act does not prohibit military observers from reporting to the Department of Defense; nor does it generally prohibit the preparation of contingency plans for lawful military intervention; advice to civilian officials, sharing intelligence information collected during the normal course of military operations, including operations relating to the incident; the loan of specialized equipment or weaponry; the use of military personnel to deliver and maintain equipment for civilian use, provided those personnel do not operate that equipment;* or the use of military personnel to train civilian law enforcement officials in the operation and maintenance of military equipment. *See* 10 U.S.C. §§ 371-78 (Supp. 1981); DOD Directive 5525.5, "DOD Cooperation with Civilian Law Enforcement Officials," 47 Fed. Reg. 14899 (April 7, 1982). Application of the Posse Comitatus Act may differ depending on the particular factual situation presented, and advice should be obtained whenever possible from appropriate officials.

Precautionary steps, such as the prepositioning of troops near the incident site may be undertaken with the approval of the DOD and the SAC. Prepositioning must, of course, be undertaken with discretion. The prepositioning of more than a battalion-sized unit (approximately 500 men) by order of the Secretary of Defense will be undertaken only with the informal approval of the President. Such approval will be sought by the Attorney General, and, ordinarily, only if there appears to be a substantial likelihood that such forces will be required.

When the SAC anticipates that federal military assistance will shortly become necessary he will promptly notify the Director, who will advise the Attorney General. After consultation with the Director of the FBI and the Secretary of Defense on the gravity of the situation, the Attorney General will advise the President whether the conditions would warrant employment of military forces at that particular time. The FBI shall disseminate information concerning the incident and its participants to military authorities as though such authorities were operating in a law enforcement capacity. Such information may be retained by appropriate military components in accordance with procedures agreed upon by the Department of Justice and the Department of Defense.

IV. Employment of Military Forces. If the President decides to approve the use of military force, the Attorney General will, where neces-

*In the event the incident involves certain violations of federal law relating to controlled substances, immigration and nationality matters, or tariff and customs offenses, additional authority may be available permitting the use of military personnel to operate and maintain military equipment. *See* 10 U.S.C. § 374 (Supp. 1981).

sary, furnish the President with an appropriately drawn proclamation and executive order, or other documents needed to implement his decision. Although the Attorney General has statutory authority to request the assistance of military forces for certain law enforcement purposes, military forces will not be committed in such circumstances without Presidential approval.

When the use of military force is approved, the Secretary of Defense will conduct the military operation subject to law enforcement policies determined by the Attorney General. The Secretary of the Army, as Executive Agent for the Secretary of Defense, is responsible for the necessary military decisions and for issuance of the appropriate orders to the Military Task Force Commander. The established law enforcement policies may require revision or elaboration during the actual military operation; in that event, the Secretary of the Army will refer such matters, military exigencies permitting, to the Attorney General, with his recommendation.

The Attorney General through the FBI will remain responsible for: (1) coordinating the activities of all federal agencies assisting in the resolution of the incident and in the administration of justice in the affected area, and (2) coordinating these activities with those State and local agencies similarly engaged.

Upon notification of a presidential approval to use military force, the Attorney General will advise the Director of the FBI who will notify the SAC; the Secretary of Defense will advise the Military Task Force Commander. The Military Commander and the SAC will coordinate the transfer of operation control to the Military Commander.

Responsibility for the tactical phase of the operation is transferred to military authority when the SAC relinquishes command and control of such operation and it is accepted by the on-site Military Task Force Commander. However, the SAC may revoke the military commitment at any time prior to the assault phase if he determines that military intervention is no longer required, provided that the Military Commander agrees that a withdrawal can be accomplished without seriously endangering the safety of military personnel or others involved in the operation. The Military Commander may utilize FBI personnel as hostage negotiators, translators, sniper/observers, and in other similar support roles, but FBI personnel may not participate in the tactical assault unless expressly authorized by the SAC.

When the Military Task Force Commander determines that he has completed the assault phase of the operation, command and control will be promptly returned to the SAC.

V. Post Incident Responsibilities. Upon termination of the incident and return of command to the FBI, all military personnel will be evacuated immediately to a relocation site mutually agreed upon by the SAC and the Military Commander. However, certain key military personnel may be requested to remain briefly at the site if the SAC determines that their continued presence is necessary to protect the integrity of the investigative process. The FBI wil make every reasonable effort to expedite interviews of military personnel and will afford such constitutional and procedural safeguards, including the presence of military counsel, as may be appropriate to the inquiry. To the extent permitted by law, the FBI will protect the identity of such personnel and any sensitive methods or techniques used during the operation from public disclosure. All such information will be handled in accordance with the classification level established by the military and with the requirements of Executive Order 12356 or any successor Order or regulations, where appropriate. In addition, procedures will be established to insure that any forensic examination of weapons or other equipment used by military personnel that may be necessary will be conducted as expeditiously as possible.

VI. Terrorist Incidents on a Military Reservation. The respective roles of the Defense Department, the Justice Department and the FBI with respect to a terrorist incident on a military reservation are essentially the same as described in Section II above. However, the installation commander is responsible for the

maintenance of law and order on a military reservation and may take such immediate action in response to a terrorist incident as may be necessary to protect life and property. The FBI will be promptly notified of all terrorist incidents and will exercise jurisdiction if the Attorney General or his designee determines that such incident is a matter of significant federal interest. Unless otherwise specified, the SAC of the appropriate region acting under the supervision of the Director shall be the Attorney General's designee in such matters. The Attorney General may request military assistance without presidential approval in such circumstances, but such assistance shall be furnished in a manner consistent with the provisions of this memorandum of understanding. If the FBI declines to exercise its jurisdiction, military authorities will take appropriate action to resolve the incident.

Nothing in this section affects the investigative responsibilities of the military departments or the FBI as set forth in the "Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over which the Two Departments have Concurrent Jurisdiction," dated July 19, 1955.

VII. Funding. All Department of Defense assistance provided to the Department of Justice under the provisions of this Memorandum will be on a reimbursable or reclaimable basis in accordance with the Economy Act, 31 U.S.C. §§ 1535-36 or regulations promulgated by the Secretary of Defense pursuant to 10 U.S.C. § 377, through DOD Executive Agent, the Department of the Army. Standard pricing will be used to the maximum extent possible including the cost of the additional personal services of military and civilian personnel in accordance with the DOD Accounting Guidance Handbook for Billing Federal, non-DOD agencies. Reimbursement will also include incremental costs, meaning such costs which would not have been incurred in the absence of the incident.

VIII. Terms of Agreement. This Agreement will become effective immediately upon signature by all parties and shall continue in effect unless terminated by any party upon notice in writing to all other parties.

Amendments or modifications to this agreement may be made upon written agreement by all parties to the agreement.

signed — 5 Aug '83
John O. Marsh, Jr. (Date)
Secretary of the Army

signed — June 16, 1983
Jeffrey Harris (Date)
Acting Associate Attorney General
U.S. Department of Justice

signed — June 23, 1983
William H. Webster (Date)
Director
Federal Bureau of Investigation

Pretrial Restraint and Pretrial Confinement

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Introduction

One of the questions that a commander must face is what to do with a soldier pending trial or other disposition of possible charges. Should the soldier simply continue to perform regular military duties with no change in status? Should some limits be placed on the soldier's freedom? Should the soldier be totally removed from the unit and placed in pretrial confinement pending trial? The answers to these questions depend on the offenses and the soldier involved and are governed by the military's distinctive rules on pretrial restraint and confinement, which are carefully delineated and limited in the Manual

for Courts-Martial and case law.

Restraint in the military is particularly significant because *any* pretrial restraint implicates speedy trial rules.[1] Because there is no bail system, the courts and the President, through the Manual, have fashioned strict speedy trial rules that require soldiers accused of crimes to be brought to trial quickly.[2] Certain forms of pretrial restraint also are taken into consideration on sentence, including credit for pretrial confinement and additional credit for the government's failure to abide by the rules concerning when and how to impose restraint before trial.

Pretrial Restraint Generally

Pretrial restraint is defined as "moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses."[3] Pretrial restraint includes pretrial confinement, the most severe form of restraint, and the general rules pertaining to restraint apply equally to pretrial confinement.

Types of Prior Restraint

Rules for Courts-Martial 304 lists four types of restraint: conditions on liberty, restriction in lieu of arrest, arrest, and pretrial confinement.

Conditions on Liberty

"Conditions on liberty" is a type of restraint listed separately for the first time in the 1984 Manual. This restraint is defined as "orders directing a person to do or refrain from doing specified acts," and includes orders to report periodically to a specified person, orders not to go to a certain place (such as the scene of the crime), or orders to stay away from certain persons (such as the victim, potential witnesses, or co-accused).[4] Any of these orders is a form of pretrial restraint that starts the running of the speedy trial clock. Commanders and trial counsel must co-ordinate to lessen the possibility of accidentally triggering speedy trial rules by imposing conditions on liberty. Unlike other forms of restraint, these orders often are not perceived as a restriction on the pretrial liberty of an accused. R.C.M. 304 points out that the rule is not intended to prohibit the commander from imposing administrative sanctions for purposes other than military justice, but commanders must be wary of any sanctions taken against soldiers who are pending charges.[5]

Restriction

Restriction in lieu of arrest, commonly called restriction, is the restraint of a soldier by oral or written orders directing the soldier to remain within certain specified limits which are set by the person ordering the restriction.[6] Soldiers placed on restriction usually continue to perform full military duties. This limiting of a soldier's freedom of movement to a particular area or areas is frequently expressed as "restriction to barracks, mess hall, chapel, and place of duty." The withdrawal of pass privileges, while it may limit the service member's movement to the confines of a military installation, is not normally considered a restriction.[7]

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[1]Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 707 [hereinafter cited as R.C.M.] states that *all* accuseds must be brought to trial within 120 days of notice of preferral of charges or imposition of restraint, whichever is earlier. The rule refers to all types of restraint under R.C.M. 304.

[2]In addition to R.C.M. 707 promulgated by the President in the 1984 Manual for Courts-Martial, the Court of Military Appeals has devised specific rules dealing with soldiers in pretrial confinement in United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971). The court has also held that the Supreme Court's enunciated rules for speedy trial under the sixth amendment in Barker v. Wingo, 407 U.S. 514 (1972), apply to the military. United States v. Johnson, 17 M.J. 255 (C.M.A. 1984). The *Baker* analysis includes evaluating prejudice to the defendant caused by excessive pretrial incarceration.

[3]R.C.M. 304(a).

[4]R.C.M. 304(a)(1) and the discussion thereto. The extent of conditions on liberty is likely to be a subject of litigation as courts attempt to answer whether actions not previously considered related to pretrial restraint, *e.g.*, suspension of privileges, will constitute a condition on liberty.

[5]R.C.M. 304(h).

[6]R.C.M. 304(a)(2).

[7]*But see* United States v. Powell, 2 .M.J. 6 (C.M.A. 1976) (revocation of pass privileges considered the equivalent of restriction where all other members of the unit were granted pass as a matter of course). Restriction must be reasonable under the circumstances. If restriction is so

Restriction may also be imposed as punishment by a court-martial or under Article 15. It may not be imposed as a form of *punishment* pending the disposition of offenses. Only a violation of a *legally* imposed restriction may be punished under Article 134 as the offense of breach of restriction.[8]

Arrest

Arrest is defined in the military legal system as the restraint by oral or written orders directing a soldier to remain within specified limits.[9] This should not be confused with taking a person into custody, which is referred to as "apprehension" in the military. Arrest is similar to restriction except that arrest is a more severe deprivation of liberty in that a person in arrest is suspended from the performance of full military duties, and the limits of arrest are usually narrower than those of restriction. Individuals in arrest may not exercise command, bear arms, exceed the limits of their arrest, perform guard duty, or perform other duties inconsistent with the status of arrest.[10] The status automatically ends when the person in arrest is placed on duty inconsistent with that status by the person who ordered the arrest or a superior authority.[11] Thus, if an officer is placed in arrest but is then permitted to exercise command by the officer who ordered the arrest, the status of arrest is terminated. Persons in arrest may do ordinary cleaning and policing and may take part in routine training and duties within the specified limits of the arrest.[12]

Pretrial Confinement

Pretrial confinement is physical restraint depriving a person of freedom pending disposition of offenses.[13] Confinement is normally served in an authorized confinement facility and is governed by a particular set of rules that will be discussed in detail below.

Who May Order Pretrial Restraint

Officers and warrant officers may be ordered restrained only by their commanding officers.[14] Only commanding officers may order pretrial restraint for civilians who are subject to court-martial.[15] The authority to restrain civilians and officers may not be delegated.[16] Any commissioned officer may order the restraint of an enlisted person, and that authority may be delegated by the commanding officer to warrant officers and noncommissioned officers.[17] As with the authority to dispose of charges, superior competent authority may withhold from subordinates the power to order pretrial restraint, *i.e.*, a battalion commander could withhold from company commanders the authority to order restraint of any person.[18] In many commands, the authority to order restraint of officers is withheld by the general court-martial convening authority.

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severe or so onerous that it is the equivalent of confinement, it will be treated as pretrial confinement no matter how it is characterized by the official ordering the restraint. R.C.M. 304(a)(4) discussion. That means that a restraint which includes restriction to the narrow confines of a squadron area and an hourly sign-in requirement will be properly characterized as confinement, implicating the particular speedy trial rules and credit for confinement rules applicable to that type of confinement. United States v. Schilf, 1 M.J. 251 (C.M.A. 1976). *See also* United States v. Acireno, 15 M.J. 570 (A.C.M.R. 1982) (accused who was restricted to two floors of the barracks, not permitted to leave the unit area without an NCO escort, not permitted to attend unit formations, and not permitted to perform normal military duties was in a status equivalent to pretrial confinement).

[8]United States v. Haynes, 15 C.M.A. 122, 35 C.M.R. 94 (1964).

[9]R.C.M. 304(a)(3).

[10]*Id.* and discussion thereto.

[11]R.C.M. 304(a)(3).

[12]*Id.* In practice, the restraint of arrest is rarely used.

[13]R.C.M. 304(a)(4).

[14]Uniform Code of Military Justice art. 9(c), 10 U.S.C. § 809(c) (1982) [hereinafter cited as UCMJ]; R.C.M. 304(b)(1).

[15]*Id.*

[16]*Id.*; R.C.M. 304(b)(3).

[17]UCMJ art. 9(b); R.C.M. 304(b)(2) and (3).

[18]In many commands, the authority to impose pretrial confinement is withheld by superior commanders. Frequently, the general court-martial convening authority withholds the power to order pretrial confinement and then delegates that authority either to the staff judge advocate or to brigade level commanders. *See also infra* notes 34 and 35 and accompanying text.

When Pretrial Restraint May Be Imposed

The decision to impose pretrial restraint, and what type to impose, should be made on a case-by-case basis. Pretrial restraint is never required by law and the type restraint selected, if any, should be only that sufficient to insure the presence of the accused at trial or to prevent future serious misconduct.[19] In addition to determining that the type of restraint is required by the circumstances, the person ordering restraint should have a reasonable belief that the person to be restrained has committed an offense triable by court-martial.

Procedures for Ordering Pretrial Restraint

Except for pretrial confinement, pretrial restraint is imposed by notifying the soldier of the restraint, including its terms or limits. The notification can be oral or written and must be delivered to enlisted soldiers by the person who ordered the restraint or another person subject to the Code.[20] Notification of restraint of an officer or civilian must be delivered personally by the officer who ordered it or by another commissioned officer.[21] Pretrial confinement is imposed by written orders (typically, a confinement order) and delivery of the soldier to a proper confinement facility.[22] A soldier who is placed under restraint must be informed of the offense that is the basis for the restraint.[23] Except for pretrial confinement, pretrial restraint does not require notice to the soldier of the right to detailed counsel or civilian counsel.[24] Although the Federal Rules of Criminal Procedure require this notice for restraint short of confinement, the purpose of that provision is to protect the accused at events in the criminal process that follow shortly after an initial appearance in court.[25] The military procedures for disposition of charges treat each step in the pretrial process separately and provide for advice to the accused concerning counsel rights at other appropriate steps in the process.[26] Restraint other than confinement in the military is simply a preliminary step that does not require important decisions by the accused that could necessitate the advice of counsel.

Punishment Prohibited

Article 13 of the UCMJ states that persons being held for trial may not be punished.[27] Pretrial restraint is not punishment and persons in pretrial restraint may not be punished for the offense which is the basis of their restraint. They may not be forced to undergo punitive duty hours or training or be treated identically to sentenced prisoners. Prohibitions include punitive labor and the wearing of special uniforms prescribed for post-trial prisoners.[28] If a pretrial confinee is kept under the same conditions as sentenced prisoners, the pretrial confinement may be illegal.[29]

The issue of whether a waiver of the Article 13 right is proper if voluntary and based on regulatory authority concerning conditions in confinement facilities is undecided. At least

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[19]UCMJ arts. 9(d), 10 and 13; R.C.M. 304(c) and discussion thereto. *See also* United States vs. Haynes, 15 C.M.A. 122, 35 C.M.R. 94 (1964).

[20]R.C.M. 304(d).

[21]*Id.*

[22]*Id. See also* Dep't of Army, Reg. No. 27-10, Military Justice, para. 5-13*c* (1 July 1984) [hereinafter cited as AR 27-10].

[23]R.C.M. 304(e). Other notification requirements for soldiers placed in pretrial confinement are found in R.C.M. 305(e) and discussed at *infra* notes 46-53 and accompanying text. *See also* UCMJ art. 10, which requires that an accused placed in arrest or confinement prior to trial be immediately informed of the offenses. Failure to give the required notice does not entitle the accused to specific relief, absent a showing of actual prejudice. R.C.M. 304(3) analysis.

[24]R.C.M. 304(e), 305(e).

[25]Fred R. Crim. P. 5(c).

[26]R.C.M. 304(e) analysis.

[27]UCMJ art. 13.

[28]R.C.M. 304(f). *See also* United States v. Davidson, 14 M.J. 81 (C.M.A. 1982).

[29]United States v. Bruce, 14 M.J. 254 (C.M.A. 1982); United States v. Pringle, 19 C.M.A. 324, 41 C.M.R. 324 (1970). The government may be able to rebut the contention of illegal confinement by showing that commingling the accused with sentenced prisoners was not punitive and not prejudicial. United States v. Murray, 16 M.J. 914 (M.M.C.M.R. 1983). *See also* United States v. Peacock, CM 443866 (A.C.M.R. 31 Jan. 1985).

absent statutory or regulatory authority, a pretrial confinee cannot waive the Article 13 right not to be punished before trial by accepting the conditions of a sentenced prisoner.[30] The waiver is not proper and the pretrial confinement is illegal. Not permitting pretrial confinees to waive the right and accept the conditions of sentenced prisoners may actually work a hardship on pretrial confinees, at least concerning housing arrangements within the confinement facility. Many confinement facilities are set up to provide some amenities to post-trial prisoners as part of the rehabilitative process, and forced segregation of pretrial confinees precludes them from participating in those activities of the facility.[31]

Termination of Pretrial Restraint

Soldiers may be released from pretrial restraint by officials authorized to impose it.[32] Special rules regarding release from pretrial confinement are discussed below. Otherwise, pretrial restraint ends when a sentence is adjudged, the accused is acquitted, or charges are dismissed.[33]

Pretrial Confinement Generally

As the most severe form of pretrial restraint, pretrial confinement has a particular set of rules and required procedures. Pretrial confinement implicates specific speedy trial rules, requires credit against the adjudged sentence for both legal and illegal confinement, and implicates some constitutional considerations because of the deprivation of individual liberty involved.

The Court of Military Appeals has decided several cases dealing with procedures for imposing pretrial confinement and when such restraint is appropriate. In addition, the 1984 Manual for Courts-Martial has formalized the procedures and summarized the requirements in R.C.M. 305, making several significant changes in the law concerning pretrial confinement.

Commanders make the initial decision to confine, but they should obtain all essential facts in cases where pretrial confinement is being considered and consult with a judge advocate prior to ordering a soldier into pretrial confinement because the decision to confine will be reviewed periodically to determine if continued confinement is appropriate.[34] Whenever a soldier is confined, the staff judge advocate or his or her designee must be notified.[35]

In some circumstances, pretrial confinement is not appropriate. For example, pretrial confinement is not authorized for an accused who has been charged with an offense "normally tried by a summary court-martial. . . ."[36] Pretrial confinement is also not authorized for individuals pending administrative discharge where no charges are awaiting disposition.[37]

Decision To Confine

The initial confinement decision is normally made by the accused's unit commander. The person ordering confinement must have a reasonable belief that the accused has committed an offense punishable by court-martial, that lesser forms of restraint would be inadequate and that confinement is necessary because

(1) The accused is a flight risk, or

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[30]*Bruce*, 14 M.J. at 256. The Court of Military Appeals has granted petition in a case in which the issues include the validity of a waiver of the Article 13 right not to accept conditions of a sentenced prisoner and the extent of administrative segregation permitted for pretrial confinees. United States v. Palmiter, 16 M.J. 139 (1983).

[31]*Id.*

[32]R.C.M. 304(g).

[33]*Id.*

[34]R.C.M. 305(h)(2)(A) and analysis thereto. In most commands, the authority to order pretrial confinement is withheld from subordinate commanders. Frequently, the general court-martial convening authority withholds the pretrial confinement decision and delegates approval authority to the staff judge advocate.

[35]AR 27-10, para. 5-13*a*.

[36]UCMJ art. 10.

[37]This follows from the provisions of UCMJ art. 10 that state that a prisoner placed into pretrial confinement must be informed of the specific wrong of which he or she is accused and immediate steps taken to try or release. If the soldier is only pending an administrative discharge, but not criminal charges, pretrial confinement would violate Article 10.

(2) It is foreseeable that the accused will engage in *serious criminal misconduct.*[38]

The commander must only *consider* lesser forms of restraint and determine that restriction or conditions on liberty or arrest would not be sufficient if the soldier were returned to the unit.[39] There is no requirement to actually try the lesser forms of restraint first and have them proved inadequate before resorting to confinement.

"Serious criminal misconduct" includes intimidation of witnesses or other obstructions of justice, seriously injuring others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command.[40] The definition and criteria of R.C.M. 305 are not intended to allow pretrial confinement for the "pain in the neck" soldier whose behavior is merely an irritant to the commander, but it does cover the "quitter" who adversely affects morale and discipline in the unit by disobeying orders or refusing to perform duties.[41] The rule slightly expands the legitimate bases for confinement found by the Court of Military Appeals in *United States v Heard,*[42] but basically follows the edict set down in *Heard* that pretrial confinement is proper only to insure the presence of the accused at trial and to protect the safety of the community. Other considerations for placing soldiers in pretrial confinement, including concern for the personal safety of the accused, are improper.[43]

The commander considering pretrial confinement should take several factors into account, including the nature and circumstances of the offenses; any extenuating circumstances concerning the offenses; the weight of evidence against the accused; the accused's ties to the local community, including family, other employment, and local residence; the character and mental condition of the accused; any past misconduct by the accused; the accused's past record of appearance at or flight from other similar proceedings; and the likelihood that the accused will commit other serious criminal acts if allowed to remain free or if only lesser restraint is imposed.[44] It is because the commander is in a unique position to assess the predictive aspects of the initial confinement decision, including the accused's likely behavior and the impact of release or confinement on mission performance, that the initial decision is left to him or her.[45] In addition, the commander's written assessment of these factors serves as a partial basis for later review of the propriety of confinement by a neutral and detached official.

Confinement Procedure

An accused who is to be confined must be informed of the offenses for which confined, the review procedures for confinement, the right to remain silent and that any statements made may be used against him or her, and the right to counsel.[46] The right to counsel includes the right to retain civilian counsel at no expense to the government and the right to request assignment of military counsel.[47] There is no right to individually requested military counsel. This right to counsel pertains solely to counsel for the pretrial confinement stage of the proceedings, that is, to protect the accused's interest in the pretrial confinement determination and review by the neutral and detached of-

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[38]R.C.M. 305(h)(2)(B).

[39]*Id.* discussion. *See also* United States v. Otero, 5 M.J. 781 (A.C.M.R. 1978).

[40]R.C.M. 305(h)(2)(B).

[41]*Id.* analysis.

[42]3 M.J. 14 (C.M.A. 1977). In *Heard,* the court addressed the question of the propriety of pretrial confinement at length. Much of the Manual rule is based on the court's decision and subsequent interpretations of it. The court said that seriousness of the offense does not *per se* justify confining an accused and that the only considerations justifying confinement were assuring presence at trial and protecting the safety of the community. The drafters of the 1984 Manual have expanded this language slightly by defining "safety of the community" more broadly. R.C.M. 305(h)(2)(B) analysis.

[43]Berta v. United States, 9 M.J. 390 (C.M.A. 1980).

[44]R.C.M. 305(h)(2)(B) discussion.

[45]R.C.M. 304(h) analysis.

[46]R.C.M. 305(e).

[47]R.C.M. 305(f).

ficial.[48] Counsel appointed at this stage is not required by law to represent the accused through trial;[49] however, this is the usual practice in many jurisdictions. Whenever a soldier is to be ordered into pretrial confinement, the staff judge advocate requests an appointed counsel from the supporting office of the Trial Defense Service.[50] It is preferable, though not required, that the consultation between accused and counsel occur prior to the accused's entry into pretrial confinement. If that is not possible, consultation should occur within seventy-two hours.[51] The counsel for consultation with the accused concerning pretrial confinement frequently is detailed to represent the accused throughout any subsequent proceedings.

Although the Manual rule is intentionally silent concerning who informs the accused of these rights prior to pretrial confinement, to allow the government flexibility,[52] normal practice will likely have the defense counsel who consults with the accused prior to or within seventy-two hours of confinement give the required notice. Failure to comply with notice requirements does not render the confinement automatically "illegal" and trigger a remedy, but violations of the notice requirement are tested for specific prejudice.[53] Failure to provide appointed counsel prior to the magistrate's review after a request by the accused, however, does make the pretrial confinement illegal, requiring administrative credit as discussed below.[54]

The accused's commander must review the validity of pretrial confinement within seventy-two hours after it is imposed.[55] Because normally the commander personally makes the initial confinement decision, this review ordinarily is done at the time pretrial confinement is ordered. If the commander who orders confinement takes the proper steps at the time of confinement, there is no requirement for a review by the same commander seventy-two hours later. The Manual rule does not intend to create a "cooling-off period" after which the commander must re-evaluate his or her own decision. The seventy-two hour requirement applies mainly to confinement ordered by someone other than the immediate commander. In that circumstance, the immediate commander must review the validity of the confinement within the prescribed time; this allows for a reasonably prompt determination while taking into consideration times in which the commander may not be immediately available.

The commander must make basically the same determination as is required for any type of pretrial restraint: that less severe restraint would be inadequate and that the accused is either a flight risk or will foreseeably engage in serious criminal misconduct.[56] The commander who orders confinement must prepare and forward to the magistrate a written memorandum, "Checklist for Pretrial Confinement," detailing why confinement is appropriate and necessary.[57]

Review Procedure

R.C.M. 305(i) sets up specific procedures for review of pretrial confinement. The review of the legality of confinement must be completed within seven days by a neutral and detached official.[58] Although the Supreme Court has held that reviewing officials in similar circumstances

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[48] *Id.*

[49] *Id.* analysis. The rule is designed to recognize that counsel appointed at the pretrial confinement stage cannot always continue to represent the accused because of the location of some confinement facilities and the limits on legal resources, although continued representation would be desirable in most circumstances. *Id.*

[50] AR 27-10, para. 5-13*b*.

[51] *Id.*

[52] R.C.M. 305(e) analysis.

[53] *Id. See also* R.C.M. 305(k).

[54] R.C.M. 305(k). Violation of this provision requires administrative credit because the assignment of counsel is important to insuring the fairness of the pretrial confinement process.

[55] R.C.M. 305(h)(2)(A).

[56] R.C.M. 305(h)(2)(B).

[57] R.C.M. 305(h)(2)(C); AR 27-10, para. 5-13*c*.

[58] R.C.M. 305(i)(1). *See also* United States v. Lynch, 13 M.J. 394 (C.M.A. 1982).

need not be legally trained,[59] the Army requires that the pretrial confinement review be done by a military magistrate who is a qualified judge advocate.[60] The time period for review can be extended to ten days by the magistrate for good cause.[61] The pretrial confinement review is similar to what the Supreme Court requires for parole revocation hearings,[62] with the additional feature that the accused is always provided the opportunity to obtain counsel. The magistrate reviews the commander's memorandum and any additional matters, including any submitted by the accused.[63] During the review process, both the accused and counsel are permitted to appear before the magistrate and make statements. In addition, a representative of the command is also permitted to appear and make a statement.[64] The language of the rule seems to leave the appearance of the command's representative to the magistrate's discretion, while the accused and defense counsel "shall be allowed" to appear, if practicable. In practice, this "appearance" by either or both sides may consist of telephone calls between the magistrate and counsel, although magistrates are instructed to interview the accused prior to reaching a decision.

The Military Rule of Evidence do not apply at the review hearing and there is no right to call or cross-examine witnesses.[65] The command must show that the requirements for pretrial confinement are met by a preponderance of the evidence.[66] After completing the review, the magistrate either approves continued confinement or orders immediate release. The magistrate cannot impose conditions on release but may suggest appropriate conditions to the unit commander.[67] The magistrate is required to make a written record of decision, including factual findings and conclusions.[68] This memorandum is available to either party upon request.

The magistrate's authority and responsibility over pretrial confinement does not end at the initial review hearing. After receiving any additional significant information, the magistrate may notify the parties and reconsider the decision to confine.[69] This provision of the Manual rule makes clear the continuing authority of the magistrate over pretrial confinement, an authority that diminishes but does not end when the case is referred to trial.[70]

Who May Order Release

Once the accused has been confined, only certain specific persons may order release. In addition to the magistrate who reviews confinement, any commander of the accused can order release,[71] although this is probably limited in the same way in which any commander may confine: superior commanders may withhold from subordinates the authority to confine or

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[59]Shadwick v. Tampa, 407 U.S. 345 (1972) (magistrate who reviews probable cause determinations need not be a lawyer). The Manual provisions do not require that the reviewing official be legally trained; the requirement is simply for a neutral and detached officer. R.C.M. 305(i)(2) and analysis thereto.

[60]AR 27-10, para. 9-1*d*. This requirement is peculiar to the Army. Prior to the 1984 Manual, the Air Force used non-lawyers to review pretrial confinement. Following the adoption of the new Manual, the Navy and Marine Corps changed to the Air Force system of using non-lawyer line officers as magistrates.

[61]R.C.M. 305(i)(4).

[62]R.C.M. 305(i) analysis. The review procedure is patterned after the procedures described in Morrissey v. Brewer, 408 U.S. 471 (1972).

[63]R.C.M. 305(i)(3)(A).

[64]*Id.* The specific language, stating that the accused and counsel "shall be allowed" to appear, while a representative of the command "may appear" seems to leave the decision of whether to hear the command's representative to the magistrate's discretion, while appearance of the accused is mandatory unless impracticable. Because violation of the review provisions makes the confinement "illegal," requiring adminsitrative credit (*see* R.C.M. 305(k)), the magistrate should be cautious in deciding that appearance would be impracticable.

[65]R.C.M. 305(i)(3)(B).

[66]R.C.M. 305(i)(3)(C).

[67]AR 27-10, para. 9-5*b*(3).

[68]R.C.M. 305(i)(6); AR 27-10, para. 9-5*b*(6).

[69]R.C.M. 305(i)(7).

[70]*Id.* analysis. *See also* R.C.M. 305(J) analysis.

[71]R.C.M. 305(g).

order release. After charges are referred to trial, the detailed military judge can order release in some circumstances.[72]

Role of the Military Judge

The military judge has some oversight authority for pretrial confinement once the case is referred to trial. Upon defense request, the judge can review the propriety of pretrial confinement. This could be done at a pretrial conference or at an Article 39(a) session, and the judge could review both the propriety of continued confinement and the question of whether any confinement already served was illegal.[73] The judge's release powers are limited, however, and he or she may order release only if:

1. The magistrate's decision was an abuse of discretion and insufficient information is presented to the judge that justifies continued confinement; or

2. Information that was not presented to the magistrate shows that the accused should be released; or

3. There has been no review by a magistrate and the judge determines that the requirements for confinement have not been met.[74]

This limitation of the judge's release powers is new in the 1984 Manual and changes past case law holding that the military judge reveiwed the confinement decision *de novo* and could simply overrule the decision not to release.[75] This signifies the importance that the Manual rules place on the magistrate's role in the pretrial confinement process.

In addition to reviewing the decision to confine, the military judge also orders administrative credit for any pretrial confinement served as a result of abuse of discretion; failure to provide military counsel, if requested, before review; failure by the commander to comply with the procedures for action within seventy-two hours or failure by the commander to properly consider the reasons for confinement; or failure to comply with review procedures.[76] Confinement served under any of these conditions is defined as "illegal pretrial confinement" under the Manual rules, and the military judge is required to order administrative credit.[77] When the 1984 Manual was originally drafted, the administrative credit for failure to follow the rules was at a rate of one and one-half days credit for each day of illegal confinement.[78] After the Court of Military Appeals decided *United States v. Allen*,[79] discussed in detail below, the Manual provision was revised to require a one-for-one credit against the adjudged sentence for illegal confinement.

Confinement After Release

After a competent authority has ordered release from confinement, the accused cannot be placed back into pretrial confinement before the trial is over unless new evidence justifies reconfinement or unless subsequent misconduct justifies ordering the accused confined again.[80] This means that a commander cannot "overrule" a magistrate's decision by ordering an accused back into confinement after the magistrate has ordered release.[81] If an additional of-

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[72]*Id.*; R.C.M. 305(j).

[73]R.C.M. 305(j) analysis.

[74]R.C.M. 305(j). *See also* Porter v. Richardson, 23 C.M.A. 704, 50 C.M.R. 910 (1975) (upholding authority of military judge to order release from confinement).

[75]United States v. Montford, 13 M.J. 829 (A.C.M.R. 1982); United States v. Dick, 9 M.J. 869 (N.C.M.R. 1980).

[76]R.C.M. 305(j)(2), 305(k). The requirement for administrative credit is based on the Court of Military Appeals' decision in United States v. Larner, 1 M.J. 371 (C.M.A. 1976), although the violation in that case concerned Article 13's prohibition against punishment before trial. *See also infra* notes 104-131 and accompanying text.

[77]R.C.M. 305(k) and analysis thereto.

[78]Proposed Revision of the Manual for Courts-Martial, January 1984 Draft, Proposed Rule for Courts-Martial 305(k).

[79]17 M.J. 126 (C.M.A. 1984).

[80]R.C.M. 305(l).

[81]*See also* United States v. Malia, 6 M.J. 65 (C.M.A. 1978). A commander is not precluded, however, from imposing a lesser form of restraint, such as restriction, on an accused released from pretrial confinement. AR 27-10, para. 9-5*b*(4).

fense occurs or newly discovered evidence justifies reconfinement and the commander orders the soldier back into pretrial confinement, the magistrate must be notified immediately.[82] The magistrate then conducts an additional review of the propriety of confinement, considering the new evidence or misconduct and any previously available information.[83]

The prohibitions against re-confinement also preclude the government from seeking immediate reversal of the magistrate's decision by appealing to a military judge if the charges have been referred to trial. Because the judge's review is for abuse of discretion and not a *de novo* review, and because confinement after release is only authorized upon newly discovered evidence or additional misconduct, the military judge is effectively precluded from simply overruling the magistrate and ordering the accused back into confinement.[84]

Exceptions

The Manual rules concerning pretrial confinement and required review procedures contain limited exceptions that recognize the difficulty of compliance under certain circumstances. Some procedural requirements are suspended for vessels at sea.[85] In addition, where operational requirements or military exigencies require, the Secretary of Defense may suspend some provisions of the rules for specific units or specified areas.[86] The purpose of the exception is not limited to units in combat but also applies to units deployed in a remote area or on a sensitive mission.[87] In those circumstances, the Secretary of Defense may suspend requirements to advise the accused upon ordering confinement of the right to remain silent and the right to counsel, the providing of requested military counsel, the requirement for the commander to review confinement within seventy-two hours and to prepare a written memorandum, and the procedures for review of confinement.[88] In these limited situations, the standard for confinement remains the same, the pretrial confinement is still subject to judicial review, and the commander must still evaluate the confinement to determine that less severe restraint would be inadequate and that the accused is either a flight risk or will foreseeably engage in serious criminal misconduct.[89] However, the time provisions and the review provisions are suspended due to overriding operational concerns.

Sentence Credit for Pretrial Confinement

In the past, it was uncertain what type credit an accused received for time spent in pretrial confinement. Also, was it given only if the confinement was in some way improper? How much credit would be given? The Court of Military Appeals has answered some of the questions, and the 1984 Manual has some additional guidelines on credit for pretrial confinement.

The Allen *Credit*

In *United States v. Allen*,[90] the Court of Military Appeals held that all accused are entitled to day for day credit against the adjudged sentence for time spent in pretrial confinement. Prior to *Allen*, the court had discussed the issue of credit for illegal confinement and had fashioned several rules for determining and awarding credit,[91] but *Allen* addressed the separate issue of credit simply because a soldier was confined pending trial. The court interpreted a Department of Defense instruction to require sentence computation procedures to conform with those used by the Department of Justice.

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[82]AR 27-10, para. 9-5*b*(4).

[83]*Id.*

[84]This is contrary to prior case law which put the military judge in a supervisory capacity over the magistrate and allowed the judge to simply reverse the earlier decision. *See supra* note 75.

[85]R.C.M. 305(m)(2). The exceptions for vessels at sea are more limited than those allowed for operational necessity on the decision of the Secretary of Defense.

[86]R.C.M. 305(*m*)(1).

[87]*Id.* analysis.

[88]R.C.M. 305(m)(1).

[89]*Id.* discussion.

[90]17 M.J. 126 (C.M.A. 1984).

[91]*See, e.g.*, United States v. Suzuki, 14 M.J. 491 (C.M.A. 1982); United States v. Larner, 1 M.J. 371 (C.M.A. 1976).

Because the Department of Justice, in accordance with the statutory direction of Congress,[92] grants administrative credit for pretrial custody, the court held that the military was bound to also give credit, despite statutory language specifically exempting courts-martial from the requirement to give sentence credit.[93] The court reasoned that while Congress had not made the statute's provisions mandatory for the military, the Secretary of Defense had voluntarily adopted them in the DOD instruction.[94] Although that seemed to be contrary to the language in the instruction and to the common sense interpretation of the provisions, the court nevertheless mandated that administrative credit was required. To some extent, the court seemed to believe that administrative credit was beneficial and should be given despite the statutory exclusion. In addition, Chief Judge Everett agreed with the decision because it reversed the effect of *United States v. Davidson*,[95] decided two years previously. In *Davidson*, with the chief judge concurring only in the result, the court held that because pretrial confinement was not punishment, the cumulative period of pretrial and adjudged confinement, could exceed the maximum authorized period of confinement, at least absent any showing that the pretrial confinement was in fact the equivalent of post-trial confinement.[96] Under *Allen*, the total confinement time can never exceed the maximum authorized punishment because credit is given for *all* pretrial confinement.

The court also based its decision on fairness to the accused. Court members or a military judge, during sentencing, had traditionally been instructed to "consider evidence" about "the nature and duration of any pretrial restraint" when determining an appropriate sentence.[97] As the chief judge pointed out in *Allen*, that instruction is ambiguous and might lead to diverse results as court panels devised methods for "crediting" the pretrial confinement.[98] By ordering that administrative credit be given against the adjudged sentence, the court opted for certainty in the process, probably at the ultimate expense of the accused. In the Army, military judges now instruct court members who are about to deliberate on sentence that pretrial confinement will be credited against the sentence.[99] Court members who believe that six months confinement is the appropriate amount of jail time might well extend their sentence to nine months if they know that three months credit for time spent in pretrial confinement is to be given. Court members may be unlikely or unwilling to draw subtle, legal distinctions between pretrial confinement and the need for punishment after trial. The net effect of *Allen* credit is likely to be that an accused will receive administrative credit against the adjudged sentence but that court members may give more confinement when they know that some of it will be taken away administratively.

When the Allen *Credit Applies*

The Court of Military Appeals did not address the issue of pretrial restraint other than confinement.[100] The Army Court of Military

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[92]DOD Instruction 1325.4 (7 Oct. 1968) requires the military services to follow sentence computation procedures used by the Department of Justice. However, 18 U.S.C. § 3568 (1982), which orders DOJ to give administrative credit, specifically exempts courts-martial from its application.

[93]*Allen*, 17 M.J. at 128.

[94]*Id.* at 127-28.

[95]14 M.J. 81 (C.M.A. 1982).

[96]*Id.* at 86-87.

[97]R.C.M. 1001(b)(1) requires the trial counsel to present evidence of the nature and duration of pretrial restraint to the court-martial prior to sentencing. The instructions on sentencing, Dep't of Army, Pamphlet No. 27-9, Military Judges' Benchbook, para. 2-37 (May 1982), lists the nature and duration of pretrial confinement or restriction as a mitigating factor on which the judge can instruct.

[98]*Allen*, 17 M.J. at 129.

[99]U.S. Army Trial Judiciary Memorandum 84-1, 17 Jan. 1984.

[100]The court decided, in a summary disposition, that "severe restriction tantamount to confinement" would entitle the accused to *Allen* credit. United States v. Mason, CM 445153 (C.M.A. Jan. 11, 1985). The court used the analysis from a series of speedy trial cases interpreting when to apply the rules of United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971), pertaining to speedy trial for pretrial confines. *See, e.g.*, United Sates v. Schilf, 1 M.J. 251 (C.M.A. 1976); United States v. Acireno, 15 M.J. 570 (A.C.M.R. 1982).

Review has held that administrative credit is not mandated for forms of pretrial restraint other than incarceration under *Allen.*[101] That is consistent with the intent of *Allen, i.e.,* to give credit for time actually spent in jail awaiting trial against time to be spent in jail after conviction.

In *United States v. Murphy,*[102] the Court of Military Appeals decided the issue of administrative credit for time spent in pretrial confinement at the request of a foreign government. Murphy was a Marine stationed in Japan, awaiting trial by Japanese authorities for violation of Japanese drug laws. Because he had previously gone AWOL and was considered a flight risk, he was placed in pretrial confinement pursuant to the request of Japanese authorities that he be present for trial. In a concurring opinion of two judges, the court stated that because the authority for confinement was not found in the Uniform Code of Military Justice and because the service member was not confined because of a suspected violation of the Code, the time spent in pretrial confinement afforded no basis for credit on the sentence to confinement adjudged by a subsequent court-martial on related charges.[103] The court noted that the period of pretrial confinement was a permissible factor for the sentencing authority to consider when determining an appropriate sentence but held that it did not qualify the accused for automatic administrative credit.[104]

Credit for Illegal Confinement

Prior to deciding *Allen*, the Court of Military Appeals addressed the issue of illegal pretrial confinement in several cases. The court was concerned mostly with confinement that was illegal because it violated Article 13's prohibition against punishment before trial. In *United States v. Larner*, the court determined that the "only legal and adequate remedy" was "to adjudge and to affirm an otherwise appropriate setence, but to judically order administrative 'credit' theron for the number of days served illegally in pretrial confinement."[105] The remedy applies at trial as well as during appellate review.[106] Allegations of unlawful pretrial confinement in violation of Article 13 can be raised for the first time on appeal,[107] but other improprieties involving pretrial confinement must be litigated at trial to preserve them for appellate review.[108]

Procedurally, after the military judge or members adjudge an otherwise appropriate sentence at trial, the military judge should direct the convening authority to credit the period of unlawful pretrial confinement against the approved setence.[109] It is improper for the convening authority to fail to obey the military judge's order to credit illegal confinement against the accused's sentence.[110]

For egregious cases of illegal pretrial confinement, the military judge can order *more* than day-for-day credit against the sentence. In *United States v. Suzuki,*[111] the accused was billeted, mingled, and worked with sentenced prisoners. In addition, for a period of about ten days, the accused was put in administrative segregation in a sparsely furnished, dimly lit 6 × 8-foot cell. On one occasion, he was released from the cell only after he agreed to sign a waiver to work with sentenced prisoners. The

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[101]United States v. Fair, 17 M.J. 1036 (A.C.M.R. 1984).

[102]18 M.J. 220 (C.M.A. 1984).

[103]*Id.* at 237 (Everett, C.J., and Fletcher, J., concurring).

[104]*Id.*

[105]1 M.J. 371, 372 (C.M.A. 1976).

[106]*Id. See also* United States v. Malia, 6 M.J. 65 (C.M.A. 1978).

[107]United States v. Johnson, 19 C.M.A. 51, 41 C.M.R. 51 (1969); United States v. Peacock, CM 443866 (A.C.M.R. 31 Jan. 1985).

[108]United States v. Gambini, 10 M.J. 618 (A.F.C.M.R. 1980).

[109]United States v. Suzuki, 14 M.J. 491 (C.M.A. 1982); United States v. MacKinnon, 9 M.J. 768 (A.F.C.M.R. 1980). Case law and the new Manual rules require that administrative credit for illegal pretrial confinement be granted by the convening authority when taking action on the sentence. *United States v. Suzuki;* United States v. Larner, 1 M.J. 371 (C.M.A. 1976); R.C.M. 305(k) analysis. The granting of *Allen* credit, however, is accomplished by the confinement facility.

[110]*United States v. Suzuki.*

[111]14 M.J. 491 (C.M.A. 1982).

trial judge ordered three days credit for each day of this illegal confinement.[112] The convening authority granted only day-for-day credit, and the Court of Military Appeals upheld the trial judge, stating that where pretrial confinement is illegal for several reasons, the military judge can conclude that circumstances require more than a day-for-day remedy.[113]

In addition to credit for pretrial confinement that violates Article 13, the 1984 Manual specifies a remedy for pretrial confinement imposed in violation of certain provisions of R.C.M. 305.[114] This "procedurally illegal" confinement, assessed as day-for-day credit against confinement adjudged, results when the accused has not received requested military counsel prior to review of confinement, when the commander has failed to comply with the seventy-two hour rule or failed to properly consider the reasons for confinement and document them in a written memorandum, when the review procedures have not been complied with, or for any confinement served as an abuse of discretion.[115] Credit for confinement served as an abuse of discretion is probably not limited to times when a judge reviewing a magistrate's decision finds that the magistrate abused his or her discretion in approving confinement; it probably also includes time spent in confinement as a result of the commander's abuse of discretion. Because pretrial confinement is judicially reviewable under R.C.M. 305 and requests for credit for illegal confinement are addressed to the military judge who orders the remedy, defense counsel should raise the issue of abuse of discretion whether it is the commander or the magistrate who has acted improperly.

Violations of other provisions of the Manual rules do not automatically trigger sentence relief because their violation does not cause pretrial confinement to be illegal.[116] Other violations must be tested for prejudice to the accused, and the judge must fashion a remedy appropriate to cure the prejudice.[117] If one of the required steps in the commander's action or the review procedure is omitted but the next step occurs within the prescribed time limits, no sentence credit is required[118] because the purpose of the remedy is to insure overall compliance with the procedures. If one part of the procedures is missed, but a later, more protective step is properly completed, the accused has received the substantial benefit of the required procedures. Thus, if a commander fails to review the propriety of confinement within seventy-two hours, but the magistrate reviews the legality of the confinement within seven days and confinement is approved, the omission of the commander's review does not entitle the accused to credit.

The credit under the Manual rules applies first against confinement and then against several other specified penalties if the confinement adjudged is less than the credit to which the accused is entitled.[119] After crediting against confinement, the credit is applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order.[120] Because punitive discharge and reduction in grade are such qualitatively different penalties, no administrative credit for illegal pretrial confinement is allowed against those punishments.[121] Although the Court of Military Appeals has not specifically addressed the issue of applying credit for illegal confinement in violation of Article 13 against punishments other than confinement, where they found that pretrial confinement was illegal and adjudged confinement had already been served, the court directed the case returned for meaningful sentence reassessment.[122]

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[112] *Id.* at 492.

[113] *Id.* at 493.

[114] R.C.M. 305(k).

[115] *Id.*

[116] *Id.* at analysis.

[117] *Id.*

[118] *Id.*

[119] R.C.M. 305(k).

[120] If the credit is applied against punishments other than confinement, the conversion formulas of R.C.M. 1003(b)(6) and (7) are used.

[121] R.C.M. 305(k) analysis.

[122] United States v. Suzuki, 14 M.J. 491 (1982). *See also United States v. Peacock* (court mitigated DD to BCD because of Article 13 violation where appellant had already served the adjudged confinement).

The remedy to correct illegal confinement is administrative credit. The Supreme Court has held that dismissal of the charges is *not* an appropriate remedy for illegal pretrial custody.[123] If the pretrial confinement is illegal, a prisoner who escapes cannot be convicted of escape from lawful confinement.[124]

The Interplay of Allen *Credit and Credit for Illegal Pretrial Confinement*

How does the credit for pretrial confinement that is due all accused in pretrial confinement under *Allen* work in conjunction with credit for illegal pretrial confinement? Prior to the 1984 Manual, the Navy-Marine Corps and Air Force Courts of Military Review held that there was no "double credit" if the illegal confinement was simply "procedurally illegal confinement."[125] That is, if the defect was one of failure to follow the pretrial confinement procedures that predated R.C.M. 305, such as failing to use a neutral and detached official to review confinement, the *Allen* credit was "subsumed" into the credit for illegal confinement. Based on the Court of Military Appeal's summary disposition in *United States v. Parker*,[126] that is probably the result that the court intended in *Allen*. Parker had been in pretrial confinement for eighty days and the convening authority granted thirty days credit for illegal confinement. On appeal, he requested credit under *Allen* for the entire period, but the court granted only an additional fifty days credit because of the convening authority's prior action on the illegal confinement.[127]

The 1984 Manual states, however, that credit under R.C.M. 305 is "in addition to" *Allen* credit.[128] Thus, the credit for "procedurally illegal confinement under the Manual rule is to be applied in addition to day-for-day credit given to each accused in pretrial confinement. This granting of "cumulative credit," where the accused who is in pretrial confinement in violation of the pertinent provisions of R.C.M. 305 receives double credit is a policy decision, not a decision based on case law.[129] The additional credit is provided to deter violations of the Manual rule.[130]

Credit for other illegal confinement which violates Article 13 is not subsumed under *Allen* credit. Military judges are not precluded from fashioning appropriate remedies of more than day-for-day credit in cases of blatantly illegal confinement, and that remedy is in addition to *Allen* credit.[131] This administrative credit is also applied in addition to "procedurally illegal" credit provided under R.C.M. 305 as a matter of policy to deter violations of the Manual rule.[132]

Thus, an accused who spent thirty days in pretrial confinement that was in violation of Article 13's prohibition against pretrial punishment which also violated a provision of R.C.M. 305 that mandates a credit could receive much more than day-for-day credit. The accused would receive thirty days *Allen* credit, thirty days credit for violation of R.C.M. 305, and whatever additional credit the military judge believed was justified depending on the circumstances of the Article 13 violation. In *Suzuki*, the Court of Military Appeals found that the military judge had not abused his discretion by granting three-for-one credit for a particularly egregious case of illegal confinement.[133] Although that case precedes *Allen*, and military judges should consider the fact that the accused is going to receive automatic administrative credit that was not previously available, it is not inconceivable that the accused could receive five days credit for each day spent in illegal confinement that violates both Article 13 and R.C.M. 305.

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[123]Gerstein v. Pugh, 420 U.S. 103 (1975). *See also* United States v. Nelson, 18 C.M.A. 177, 39 C.M.R. 177 (1969).

[124]United States v. Gray, 6 C.M.A. 615, 20 C.M.R. 331 (1956); United States v. Brown, 15 M.J. 501 (A.F.C.M.R. 1982).

[125]United States v. Horton, 17 M.J. 1131 (N.M.C.M.R. 1984); United States v. Shea, 17 M.J. 966 (A.F.C.M.R. 1984).

[126]17 M.J. 413 (C.M.A. 1984) (summary disposition).

[127]*Id.*

[128]R.C.M. 305(k) analysis.

[129]*Id.*

[130]*Id.*

[131]*United States v. Suzuki*; R.C.M. 305(k) analysis.

[132]R.C.M. 305(k) analysis.

[133]14 M.J. 491 (C.M.A. 1982).

Conclusion

This article has summarized the rules for pretrial restraint and pretrial confinement. Many of the procedures have been changed by the 1984 Manual for Courts-Martial and recent decisions of the Court of Military Appeals. Unlike many of the changes to the Manual, these new rules affect commanders at all levels, in addition to the lawyers who practice in the military. The decisions of commanders that implement the rules of pretrial restraint will impact on speedy trial requirements and credit for pretrial confinement. Judge advocates should insure that commanders are aware of the rules and requirements for all types of pretrial restraint and the impact that their decisions will have on the military justice system.

Area Court-Martial Jurisdiction In Korea

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Area court-martial jurisdiction is not a new concept to most senior officers within the JAGC, but to some who come in contact with it for the first time, it presents a perplexing surprise. The principal purpose of this article is to explain its advantages, and why and how it was adopted in the Republic of Korea in 1984.

I. Area Versus Command-line Jurisdiction

Officers commanding units of the types specified in the Uniform Code of Military Justice[1] may convene courts-martial. There is no requirement that an accused be assigned to the command of the officer convening a court-martial. The only requirement is that the convening authority not be the accuser.

Under command-line jurisdiction, court-martial convening authorities exercise jurisdiction over troops assigned to their commands. In the continental United States (CONUS), for example, division commanders generally exercise general court-martial (GCM) jurisdiction over all personnel assigned to the division's brigades and battalions. In that maintaining discipline is an important aspect of command, command-line jurisdiction remains the preferred arrangement. With most CONUS-based divisions, this jurisdictional arrangement is also the most practical way of handling disciplinary and other personnel actions because convening authorities are collocated with their troops. Thus, with most CONUS-based divisions, command-line jurisdiction equates to area jurisdiction.

Area jurisdiction becomes a desirable alternative to command-line jurisdiction when the distances and effective means of travel and communication between convening authorities and their troops impede the orderly administration of military justice and attendant administrative actions. Under an area jurisdiction arrangement, personnel are attached by regulation or order to the nearest GCM convening authority for the administration of military justice and for the processing of other matters requiring action by a GCM convening authority. The service members attached include not only those assigned to the command but troops assigned to other commands as well.

Because regulations cannot negate statutory authority, area jurisdiction does not remove the command-line convening authority's power to convene courts-martial. Rather, regulations promulgating area jurisdiction merely state the commander's policy as to the extent his sub-

*The author wishes to acknowledge the contribution to this article by Colonel John R. Thornock, the present staff Judge Advocate of US Army Korea and Eighth Army and the United Nations Command.

[1]Uniform Code of Military Justice arts. 22, 23, and 24, 10 U.S.C. §§ 822-824 (1982) [hereinafter cited as UCMJ].

ordinate commanders will exercise court-martial jurisdiction over troops located in and outside the geographic areas of their headquarters.

II. Implementing Area Jurisdiction

Area jurisdiction is not a new concept. It has been used without controversy throughout CONUS for many years.[2] On a typical CONUS installation, for example, tenant units whose headquarters are located elsewhere are routinely attached to the headquarters of one of the principal garrison units for the administration of military justice. Indeed, strict command-line jurisdiction would be impractical on most installations in CONUS.

Nevertheless, area jurisdiction was looked upon by some as a near-radical concept when it was proposed in US Army Korea and Eighth Army (EUSA) in 1983. Not surprisingly, company and detachment commanders generally supported area jurisdiction. They knew that area jurisdiction would put them closer to their convening authorities and servicing judge advocates, and that this would greatly enhance their ability to take prompt and effective judicial and administrative actions within their units. Some field grade commanders, on the other hand, opposed implementation of area jurisdiction as a derogation of their command authority.

Area jurisdiction was implemented in US Army Europe and Seventh Army (USAREUR) in 1972. Its success there over the past thirteen years played no small part in obtaining its approval in EUSA.[3] Commanders have accepted area jurisdiction in USAREUR. Many of those who initially opposed area jurisdiction eventually conceded that its benefits of economy and improved efficiency outweighed any disadvantages it might have.

Area jurisdiction took about one year to implement in EUSA from its initial planning stages to final approval. It involved a great amount of work by several legal clerks who compiled massive suporting data relating to troop strengths and locations, as well as court-martial statistics which demonstrated a clear need for change. Coordinated effort by several judge advocates was also required. Persuading commanders who had court-martial jurisdiction that their commands would be better off by allowing other commanders to exercise some of that jurisdiction proved to be no easy task.

In the end, area jurisdiction was approved because it simplified processing procedures for administrative and judicial actions. Hundreds of miles and several stops were removed from the required routing of many actions. Paperwork no longer moved up and down the Korean Peninsula gathering the necessary endorsements; it remained localized from initiation to completion. The potential for shorter processing time was obvious. Also, area jurisdiction brought order to a jurisdictional arrangement that made little sense. For example, one special court-martial (SPCM) convening authority had command-line jurisdiction over some of his subordinate units but not over others located on the same distant installation. Another SPCM convening authority in Seoul who was advised by two different SJAs forwarded about half of his actions north to a GCM convening authority in Uijongbu and the other half south to a GCM convening authority in Taegu. In other commands, the involvement of more than one SJA office in a particular action was not particularly unusual. The potential area jurisdiction had for improving coordination was beyond dispute, and this was another factor which helped to obtain its approval.

III. Area Jurisdiction in EUSA

EUSA Supplement 1 to AR 27-10 implemented area jurisdiction for EUSA in Korea.[4] In EUSA

[2] *E.g.*, at Fort Bragg, NC, 1st Special Operations Command (Airborne) general courts-martial are referred by Commander, XVIII Airborne Corps even though the Cdr, 1st SOCOM is by statute a GCM convening authority.

[3] General William J. Livsey, the present Commander, US Army Korea and Eighth Army, and Commander-in-Chief, US Forces, Korea, approved the area jurisdiction scheme in Korea. He served as a GCM convening authority in three successive tours as Commander, Fort Benning, GA, and Commander of two USAREUR commands, the 8th Infantry Division (Mech) and VII Corps. General Livsey's extensive experience with area court-martial jurisdiction was an important factor in his decision to direct its implementation in Korea.

there are three active area GCM jurisdictions: 2d Infantry Division (2ID), Combined Field Army (CFA), and 19th Support Command (19SC). Their areas of jurisdiction are depicted on the map at Appendix A. Unlike the arrangement in USAREUR, EUSA supplement further subdivides the GCM jurisdictions into area SPCM jurisdictions as well.

2ID exercises court-martial jurisdiction over almost half the troops stationed in Korea. It remained relatively unaffected by area jurisdiction because all of its troops are located within the division's jurisdictional area as shown on the map. Unlike the other two GCM jurisdictions in EUSA, command-line jurisdiction within 2ID essentially was already on an area basis. 2ID's main SJA office is located at Camp Casey near Tongduchon. Branch offices are located at Camp Howze, near Munson, and at Camp Stanley, near Uijongbu.

As a result of area jurisdiction, the Commander, Combined Field Army, presently exercises GCM convening authority over forty-two percent of all US Army personnel stationed in Korea. CFA is subdivided into four area SPCM jurisdictions: US Army Garrison (USAG)-Camp Page, USAG-Camp Humphreys, CFA Special Troops in Uijongbu, and USAG-Yongsan. The Yongsan area encompasses the city of Seoul and includes a number of US installations located in and around Seoul. As a result of the Army troop concentration in this area, there are twelve *non-area* SPCM convening authorities in Seoul. These twelve commanders, as well as the USAG-Yongsan Commander, exercise SPCM jurisdiction over their troops stationed in the vicinity of Seoul but not those stationed elsewhere. The unit and troop concentration near Seoul permits the SPCM jurisdictions there to be along command-lines. Area jurisdiction, however, is required for troops and units removed from Seoul.

All troops stationed in the CFA area are in the GCM jurisdiction of the Cdr, CFA. The GCM and all SPCM convening authorities within the CFA area are supported by the CFA Staff judge advocate, whose office in Uijongbu is about twenty miles—and at least one hour's drive—north of Seoul. As a result of other changes made in conjunction with area jurisdiction, the CFA SJA now has a branch office at Camp Humphreys, near Pyongtaek, and a branch office and a trial center in Seoul. Judge advocates and legal clerks in these offices come under the direct supervision of the CFA SJA, whereas before they were attached for this purpose to other commands.

Pursuant to the EUSA supplement, 19SC is subdivided into three area SPCM jurisdictions: USAG-Pusan, the Material Support Center-Korea at Camp Carroll, and USAG-Taegu. With a few exceptions, each soldier stationed in the 19SC GCM area comes under the GCM jurisdiction of the Cdr, 19SC and under the SPCM jurisdiction of the convening authority in whose area he or she is stationed. There are no branch legal offices in 19SC, so all convening authorities are supported directly by the 19SC SJA in Taegu.

IV. Actions Affected

Area jurisdiction convening authorities have complete disciplinary authority over those attached to them for the administration of military justice. In addition to convening courts-martial, this includes administering punishment and acting on appeals under UCMJ art. 15 and taking action on discharges under AR 635-100[5] and AR 635-200.[6] Also included is approval authority in cases involving reduction in grade under AR 600-200,[7] officer resignations under AR 635-120,[8] applications for discharge as a

[4]EUSA Supplement 1 to Dep't of Army, Reg. No. 27-10, Military Justice, app. E (15 June 1984). Paragraphs 2 through 5 of appendix E establish area jurisdiction throughout Korea. The EUSA supplement incorporates the format and some of the language of the corresponding USAREUR supplement to AR 27-10 which established area jurisdiction in USAREUR. Some excerpts from appendix E of EUSA supplement are in Appendix B following this article.

[5]Dep't of Army, Reg. No. 635-100, Officer Personnel, *in* Officer Ranks Personnel Update No. 2 (30 Oct. 1984).

[6]Dep't of Army, Reg. No. 635-200, Enlisted Personnel, *in* Enlisted Ranks Personnel Update No. 3 (15 Jan. 1985).

[7]Dep't of Army, Reg. No. 600-200, Enlisted Personnel Management System, *in* Enlisted Ranks Personnel Update No. 3 (15 Jan. 1985).

[8]Dep't of Army, Reg. No. 635-120, Officer Resignations and Discharges (8 Apr. 1968) (IO2, 28 Nov. 1984).

conscientious objector under AR 600-43,[9] and line of duty determinations under AR 600-33.[10] An important selling point in obtaining approval of area jurisdiction was the fact that it also included responsibility for the Physical Performance Evaluation System under AR 600-60,[11] which greatly simplified the implementation of this program in EUSA.

V. Conclusion

As a result of the conversion to area court-martial jurisdiction, the administration of military justice within EUSA is more efficient and effective. Processing procedures for both administrative and judicial actions were greatly simplified and coordination on these actions was improved. Area jurisdiction also enabled legal offices in Korea to be reorganized. This change has enhanced the general quality of legal services throughout EUSA and has placed unit commanders closer to the judge advocates who advise their convening authorities. As with any extensive reorganization, periodic evaluation and fine-tuning is required. Minor adjustments and changes, as well as close monitoring of processing times, are an ongoing process. Finally, and perhaps most important of all, the implementation of area jurisdictionin EUSA is a first, but necessary step in improving contingency plans for providing legal services in the event of hostilities, an ever-present danger in Korea.

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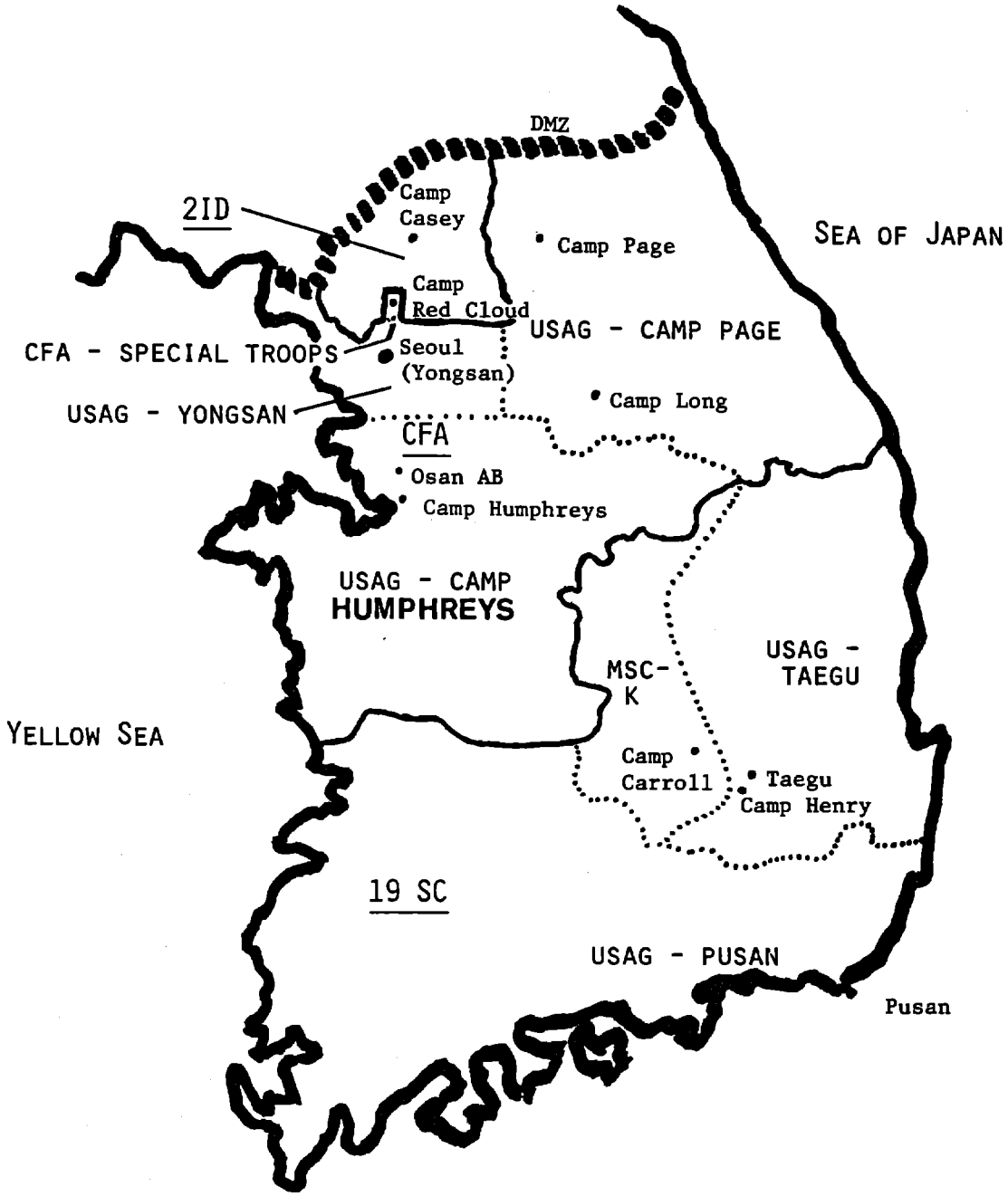
[9]Dep't of Army, Reg. No. 600-43, Conscientious Objection (1 Aug. 1983).

[10]Dep't of Army, Reg. No. 600-33, Unfavorable Information (15 Nov. 1980).

[11]Dep't of Army, Reg. No. 600-60, Physical Performance Evaluation System (1 July 1984).

Appendix A

AREA JURISDICTION - EUSA



Appendix B

EUSA Suppl 1 to AR 27-10
Appendix E
Military Justice Related Policy and Procedure

2. EUSA GCM jurisdictions. In the Eighth United States Army (EUSA), the prescribed GCM jurisdictions are:
   a. Commander, 2d Infantry Division (2ID).
   b. Commander, US Army Element, Combined Field Army (ROK/US) (CFA).
   c. Commander, 19th Support Command (19SC).
3. EUSA SPCM jurisdictions. In the EUSA the prescribed SPCM jurisdictions are:
   a. Under the Commander, 2d Infantry Division:
      (1) Commander, 1st Brigade, 2d Infantry Division
      (2) Commander, 2d Brigade, 2d Infantry Division
      (3) Commander, 3d Brigade, 2d Infantry Division
      (4) Commander, Division Support Command, 2d Infantry Division
      (5) Commander, Division Artillery, 2d Infantry Division
   b. Under the Commander, US Army Element, Combined Field Army (ROK/US):
      (1) Commander, 501st Military Intelligence Group
      (2) Commander, 1st Signal Brigade
      (3) Commander, Eighth United States Army Special Troops Command (Provisional)
      (4) Commander, 2d Engineer Group
      (5) Commander, 17th Aviation Group
      (6) Commander, 227th Maintenance Battalion
      (7) Commander, Joint US Military Assistance Group-Korea
      (8) Commander, Eighth Personnel Command (Provisional)
      (9) Commander, Eighth Medical Command (Provisional)
      (10) Commander, Special Troops, Combined Field Army (ROK/US)
      (11) Commander, US Army Garrison, Yongsan
      (12) Commander, US Army Garrison, Camp Humphreys
      (13) Commander, US Army Garrison, Camp Page
   c. Under the Commander, 19SC:
      (1) Commander, 728th Military Police Battalion
      (2) Commander, US Army Garrison, Taegu
      (3) Commander, Materiel Support Center - Korea
      (4) Commander, US Army Garrison, Pusan
4. Area jurisdiction. The commanders referenced in paragraphs 2 and 3b (10-13) and 3c (2-4) are area jurisdiction convening authorities.
5. Area court-martial jurisdiction.
   a. Except as indicated, the following personnel are attached for the administration of military justice to the command exercising general court-martial jurisdiction for the particular geographic area (paragraph f below), and further attached to the command exercising SPCM jurisdiction for the particular geographic area (paragraph g below) in which they are stationed:
      (1) Army personnel assigned to HQ, EUSA/USFK/UNC/CFC, EUSA major commands, or EUSA assigned units.
      (2) Army personnel assigned to US Army units, elements, or commands attached to EUSA/USFK/UNC/CFC.
      (3) Army personnel stationed within the boundaries described in paragraphs f or g below, who are attached for the administration of military justice to any of the foregoing units, elements, or commands.

b. Attachments include the administration of military justice, unless specifically excluded in the order of attachment. "Unit" includes brigades, battalions, companies, platoons, squads, elements, detachments, teams, activities, agencies, field offices, branches, and crews, whether or not there is a designated commander, chief, officer-in-charge, or noncommissioned officer in charge.

c. Because of area jurisdiction, two commanders, the commander of the unit to which the soldier is assigned and the commander exercising area jurisdiction over the soldier, may have the same level of military justice (GCM, SPCM, SCM, Article 15, etc.) authority over a given soldier. Except as provided in paragraphs (1) and (2) below, it is EUSA policy that the area commander exercise jurisdiction in such situations. Failure to comply with this policy, however, does not render unlawful an otherwise lawful exercise of jurisdiction.

(1) With the consent of the GCM convening authority or authorities concerned, commanders exercising Article 15, UCMJ authority over personnel may mutually agree to allow Article 15 jurisdiction in a particular case to follow command lines across GCM or SPCM area boundary lines. A permanent or temporary blanket transfer of jurisdiction, either on a formal or informal basis, will not be made between commanders or convening authorities over units or personnel under their command or within their area of jurisdiction without the approval of the Commander, EUSA.

(2) With the consent of the GCM convening authority or authorities concerned, commanders exercising court-martial jurisdiction may mutually agree to transfer court-martial jurisdiction over personnel in a particular case across GCM or SPCM area boundary lines. In such cases, when the soldier to be transferred is not already assigned or attached to the gaining command, the gaining command is authorized to publish necessary orders of attachment. A permanent or temporary blanket transfer of jurisdiction, either on a formal or informal basis, will not be made between commanders or convening authorities over units or personnel under their command or within their area jurisdiction without the approval of the Commander, EUSA.

(3) Notwithstanding subparagraphs f and g below, all troops, wheresoever stationed in the ROK, assigned or attached to the 2ID or its subordinate elements, are specifically included in the 2ID GCM jurisdiction, and are specifically excluded from the court-martial jurisdiction of commands outside of 2ID. Also, all US Army personnel assigned or attached to the US Army Criminal Investigation Command, wheresoever stationed in the Republic of Korea, come under the SPCM jurisdiction of the Commander, USAG - Yongsan and the GCM jurisdiction of the Commander, CFA.

d. Area jurisdiction convening authorities (paragraph 4 above) have supervisory authority for the administration of military justice within their prescribed geographic area (paragraphs f and g below). The authority of area jurisdiction convening authorities includes:

(1) Responsibilities specified in the UCMJ and the Manual for Courts-Martial (MCM).

(2) Authority to promulgate policy and procedures concerning the administration of military justice.

(3) Authority to draw on personnel resources for implementing paragraphs (1) and (2) above.

(4) Attachment for the administration of military justice in paragraph a above includes:

(1) SCM, SPCM, and GCM jurisdiction.

(2) Article 15, UCMJ authority over officer and enlisted personnel.
(3) Discharge under AR 635-200.
(4) Retention beyond expiration of term of service in connection with court-martial charges or arrest under AR 635-200, paragraph 1-24.
(5) Reductions in grade under AR 600-200, paragraph 8-11.
(6) Elimination of officers under AR 635-100, chapter 5.
(7) Resignations of officers for the good of the service under AR 635-120, Chapters 4, 5, or 10.
(8) Applications for discharge as a conscientious objector under AR 600-43.
(9) Line of duty determinations under AR 600-33.
(10) Requests for military personnel to appear before civil courts under AR 600-40.
(11) Requests for military personnel as witnesses under AR 27-40.
(12) Remission of cancellation of indebtedness under AR 600-4.
(13) Claims under Article 139, UCMJ.
(14) Other actions that Army or EUSA regulations require to be taken by persons exercising GCM, SPCM or SCM court-martial convening authority.

e. Notwithstanding the provisions outlined in paragraph d above, reports of survey under AR 735-11, remain in command channels. Also, "reporting commands" will continue to exercise responsibilities and render reports for their commands as required by USFK Reg 1-44. Personnel over whom the Commander, EUSA exercises GCM authority in the normal chain of command are attached to the commander exercising GCM jurisdiction for the particular area (paragraph f below) in which they physically are stationed for the exercise of all administrative actions that would require action by the Commander, EUSA, as the GCM convening authority in the normal chain of command.

f. Areas that are the responsibility of EUSA GCM jurisdictions under the area jurisdiction concept are outlined in paragraphs (1) through (3) below.

. . . .

(2) The Commander, CFA will be the GCM convening authority for all troops stationed in the ROK area inclosed by an imaginary line beginning at a point (BS 953830) on the DMZ, extending generally east along the DMZ to the Yellow Sea. Then it continues generally south along the western territorial limits of the ROK on the Yellow Sea to the coastal city of Julpo, then east along Highway 710 to the intersection with Highway 1, then north along Highway 1 to the intersection with Highway 17, then north along Highway 17 to the point where it intersects with the boundary of Chungchong Namdo and Jeonla Bugdo, then east along the boundary to the point where it intersects with Highway 19, then generally north along Highway 19 to the intersection with Highway 36, then generally northeast along Highway 36 to the intersection with Highway 597, then generally northeast along Highway 597 to the intersection with Highway 38, then generally northeast along Highway 38 to the intersection with Highway 31, then generally northeast along Highway 31 to the intersection with Highway 413, then generally northeast along Highway 413 to the intersection with Highway 42, and then generally northeast along Highway 42 to the coastal city of Bugpyeong on the Sea of Japan. Then it continues generally north along the eastern territorial limits of the ROK on the Sea of Japan to the DMZ, then generally west along the DMZ to the point where the DMZ intersects with Highway 463, then generally southeast along Highway 463 to the intersection with Highway 391, then gen-

erally southwest along Highway 391 to where it intersects with the 72 grid line, then west along the 72 grid line to CS316720, then north along an imaginary straight line connecting Cs 316720 with CS 316810, then west along grid line 81 to the point where it intersects with the 19 grid line, then south along the 19 grid line to the point where it intersects with the 72 grid line, then west along the 72 grid line to the point where it intersects with the north bank of the Han River, then generally north along the north bank of the Han River to BS 953830 on the DMZ. All US Army personnel assigned or attached to the 55th Aviation Company Element South are specifically included in the GCM jurisdiction of the Commander, CFA and the SPCM jurisdiction of the Commander, 17th Aviation Group. All US Army personnel assigned or attached to the 257th Signal Company, the 125th ATC Battalion, and the 41st Signal Battalion are specifically included in the GCM jurisdiction of the Commander, CFA and (except for the 552d Signal Company) are specifically included in the SPCM jurisdiction of the Commander, 1st Signal Brigade. All US Army personnel assigned or attached to the 36th Signal Battalion are specifically excluded from the GCM jurisdiction of the Commander, CFA.

g. Areas that are the responsibility of EUSA SPCM jurisdictions (outside 2ID) under the area jurisdiction concept are outlined in paragraphs (1) through (7) below.

. . . .

(2) The Commander, USAG - Yongsan will be the SPCM convening authority for all troops stationed in the CFA GCM jurisdiction area inclosed by an imaginary line beginning at a point (BS 953830) on the DMZ, extending generally west along the DMZ to the Yellow Sea. Then it continues generally south along the western territorial limits of the ROK on the Yellow Sea to CS 100258 on the shore of the Yellow Sea, then south along the 10 grid line to CS 100200, then east along the 20 grid line to CS 700200, then north along the 70 grid line to the point where it intersects with the north bank of the Han River, then northwest along the north bank of the Han River to BS 953830, on the CMA. All US Army personnel stationed in this area and assigned or attached to the SPCM convening authorities listed in paragraphs 3b(1) through 3b(9) are specifically excluded from the SPCM jurisdiction of the Commander, USAG - Yongsan, and are specifically included in the SPCM jurisdiction of the respective commanders referenced.

The Advocacy Section

TRIAL COUNSEL FORUM

Trial Counsel Assistance Program, USALSA

Table of Contents

Government Appeals: Winning the First Cases

Major John P. Galligan
Trial Counsel Assistance Program, USALSA

Introduction

When the 1984 Manual for Courts-Martial became effective, the provisions of Rule for Courts-Martial (R.C.M.) 908 were of keen interest to trial counsel because the rule allows the government to appeal certain adverse rulings or orders of the military judge under Article 62 of the Uniform Code of Military Justice.[1] R.C.M. 908 provides, *inter alia:*

> In a trial by a court-martial over which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal an order or ruling that terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceedings. However, the United States may not appeal an order or ruling that is, or amounts to, a finding of not guilty, with respect to that charge or specification.

The government's need for a practical means of appealing adverse rulings had been long recognized.[2] The provisions of R.C.M. 908 fill that need; however, its manner of use is less certain. One author has observed that "the initial ten-

[1]Uniform Code of Military Justice art. 62, 10 U.S.C. § 862 (1982) [hereinafter cited as UCMJ].

[2]*See* United States v. Rowel, 1 M.J. 289, 291 (C.M.A. 1976) (Fletcher, C.J., concurring). Under prior practice, the only way the government to "appeal" from an adverse ruling or order of a military judge as to petition for extraordinary relief. *See* Dettinger v. United States, 7 M.J. 216, 222 (C.M.A. 1979). However, "to justify reversal of a discretionary decision by mandamus, the judicial decison [had to] amount to more than 'gross error'; it [had to] amount 'to a judicial usurpation of power,' United States v. DiStefano, 464 F.2d 845, 850 (2d Cir. 1972), or be 'characteristic of an erroneous practice which is likely to recur.'" United States v. LaBella, 15 M.J. 228, 229 (C.M.A. 1983) (citations omitted). *Accord* Jones v. Commander, 18 M.J. 198, 202 (C.M.A. 1984) (Everett, C.J., dissenting); United States v. Strom, Misc. Docket No. 1984/4, slip. op. at 4 (A.C.M.R. 27 Apr. 1984). To constitute judicial usurpation, a court had to do what it had no power to do. DeBeers Consolidated Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945). Unfortunately, the vast majority of trial judges' erroneous decisions were characterized as being within the broad scope of their discretionary powers, and thus beyond the reach of extraordinary relief. Consequently, the government had a virtually impossible standard to meet.

dency [might] be to appeal virtually all adverse rulings, particularly in cases with intense local command interest."[3] Other commentators expected few government appeals. As one member of the Working Group of the Joint-Service Committee on Military Justice commented: "It would be highly disruptive of individual cases, not to mention trial dockets and the business of the Courts of Military Review, if the government frequently appealed trial rulings."[4]

The latter view is supported in the analysis to R.C.M. 908:

> It is not expected that every ruling or order which might be appealed by the Government will be appealed. Frequent appeals by the Government would disrupt trial dockets and could interfere with military operations and other activities, and would impose a heavy burden on appellate courts and counsel. Therefore, this rule includes procedures to ensure the Government's right to appeal is exercised carefully.[5]

Despite these forecasts, considerable activity has occurred in this new arena of appellate practice. Before the courts of military review, the government has prevailed on six appeals from adverse trial rulings and other appeals are pending decision. This article will examine how these recent cases have interpreted R.C.M. 908, discuss some of the procedural and substantive issues that have arisen, and, finally, provide trial counsel with practical insight about how to confront some of the issues which will invariably arise in the course of a government appeal.

[3]Criminal Law Division, TJAGSA, *The 1984 Manual for Courts-Martial: Significant Changes and Potential Issues*, The Army Lawyer, July 1984, at 1, 23.

[4]Cooke, *Highlights of the Military Justice Act of 1983*, The Army Lawyer, February 1984, at 40, 44.

[5]Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 908 analysis [hereinafter cited as R.C.M. 908 analysis].

The Military Cases

Five of the six government appeals under R.C.M. 908 were decided by the Navy-Marine Court of Military Review. Nevertheless, they are of interest to Army trial counsel because they constitute the first cases decided in this new area, and they address a broad variety of issues. They will be analyzed *seriatim*, followed by an examination of the Army cases decided and pending decision.

United States v. Ermitano

United States v. Ermitano[6] was the first government appeal decided under UCMJ art. 62. In *Ermitano*, the trial judge had dismissed a charge and specification under UCMJ art. 85 because it failed to allege that the accused's desertion was "without authority." The government appealed, asserting that the words contained in the specification ("absent in desertion") necessarily implied that the accused's absence was without authority.

Reversing the trial judge and ordering the allegedly deficient charge and specification reinstated, the Navy-Marine Court of Military Review first addressed the accused's challenge to the government's right to appeal. Because the charge was referred under the 1969 Manual,[7] the accused contended that the government could not appeal under the 1984 Manual. Rejecting the defense argument, the court held:

> Executive Order 12473, MCM, 1984, provides that the 1984 Manual will be in effect on August 1, 1984, as to all court-martial proceedings commenced on and after that date, with certain specified exceptions that are inapplicable to this case. With respect to R.C.M. 908, in particular, the Order provides that it shall not apply to any case in which findings and sentence were adjudged by a court-martial before August 1, 1984. In the instant case, however, the accused was not arraigned

[6]19 M.J. 626 (N.M.C.M.R. 1984).

[7]Manual for Courts-Martial, United States, 1969 (Rev. ed.) [hereinafter cited as MCM, 1969].

until August 7, 1984, and, moreover, the dismissal of the charge and specification by the military judge did not amount to a finding of not guilty. Accordingly, trial defense counsel's objection to the taking of the Government's appeal is not well founded.[8]

Distinguishing ordinary appellate review wherein a court of review is empowered to make findings of fact under UCMJ art. 66, the court recognized that it was limited to matters of law when deciding a government appeal under UCMJ art. 62.[9] It is important for trial counsel to remember this limited scope of review and to build a sufficient record upon which the appellate courts can decide the issues appealed. Trial counsel, therefore, should consider requesting the trial judge to reconsider adverse rulings and to render special findings.[10]

United States v. Ostrander

R.C.M. 908 defines two broad categories of appealable orders or rulings: those which "terminate the proceedings with respect to a charge or specification or those which exclude evidence that is a substantial proof of a fact material in the proceedings." What about the myriad of rulings or orders which do not neatly fall into either of these broad categories? Do they qualify for a government appeal?

In *United States v. Ostrander*,[11] the Navy-Marine Court of Military Review granted a government appeal of a trial judge's ruling which was construed as "*tantamount to granting of a defense motion to suppress* evidence of a pretrial oral incriminating statement made by the appellee to Naval Investigative (NIS) Agents on the grounds that alleged investigator case notes regarding the appellee's interrogation could not be produced by the Government."[12] Although not contested in *Ostrander*, the trial judge's ruling was properly appealable even though a formal suppression order was not involved. This conclusion is supported by ample federal case authority.

The provisions of R.C.M. 908 were intended to closely parallel 18 U.S.C. §3731 which permits government appeals in federal prosecutions.[13] Federal decisions emphasize that the *effect* of the trial judge's ruling, not how the trial judge labels it, determines whether the ruling is appealable. For example, in *United States v. Beck*,[14] the defendants were convicted of theft by a U.S. Magistrate. The district court, on appeal, reversed because the evidence obtained during a search of defendants should have been suppressed. The court of appeals held that the issue was appealable because even though the "district court's decisions did not, strictly speaking, 'suppress' the evidence, the practical effect of the decision [was] to suppress the evidence, because that was the only course left open to the magistrate."[15] Thus, the federal

[8]United States v. Ermitano, 19 M.J. at 627.

[9]*See* R.C.M. 908(c)(2).

[10]*See* R.C.M. 905(d) and 918(b).

[11]NMCM 84-06 (N.M.C.M.R. 19 Dec. 1984).

[12]*Id.* slip. op. at 1 [emphasis added].

[13]*See* Senate Armed Services Committee Report No. 53, 98th Cong., 1st Sess. 23 (1983). The pertinent portion of 18 U.S.C. § 1371 (1982) provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict of or finding on indictment or information, if the United States Attorney certifies to the district court that the appeal is not taken for the purpose of delay and that the evidence is substantial proof of a fact material in the proceeding.

It is immediately apparent that unlike the federal statute, R.C.M. 908 does not contain a provision concerning the return of seized property nor an express reference to the Double Jeopardy Clause. However, the first noted omission is not significant and the language in R.C.M. 908 which prohibits an appeal from "an order or ruling that amounts to a finding of not guilty" enforces the accused's protection against double jeopardy.

[14]483 F.2d 203 (3d Cir. 1973).

[15]*Id.* at 206.

courts have interpreted section 3731 broadly and have permitted appeals from all orders which have the effect of excluding evidence even though not couched in terms of suppression orders.[16]

Nevertheless, this expansive interpretation does have limitations of which trial counsel should be aware. At least one court has distinguished a government appeal which challenged the content of a discovery order as opposed to an appeal from dismissal based upon noncompliance with the discovery order. In *United States v. Kane*,[17] the district court granted a broad defense discovery request which sought transcripts of grand jury testimony, the names and addresses of grand jury witnesses and the government's trial witnesses, and a description of any evidence of uncharged misconduct which the government intended to offer at trial, together with the names and addresses of any witnesses who would testify to other such misconduct. The trial court's order granting the defense motion contained the following sanction in the event of government noncompliance: "If the government fails to comply the court will then enter an order under Rule 16. It may prohibit the introduction of evidence not disclosed or it may enter such orders it deems just under the circumstances."[18]

The government appealed this order under 18 U.S.C. §3731. Essentially, the government argued that because a possible repercussion of noncompliance could include a prohibition from introducing the evidence, the order could "fairly be characterized as an order excluding evidence and such will be its practical effect." The court of appeals rejected this argument and held that the order merely required the disclosure of specified information. Notwithstanding the final paragraph of 18 U.S.C. §3731 which provides that "the provisions of [this section] shall be liberally construed to effectuate its purposes," the course concluded that the statute's legislative history did not support the government's position. As the court stated:

> Were we to hold that Congress intended the second paragraph of section §3731 to authorize any appeal not barred by the Constitution, we would have to permit virtually unlimited government appeals from any and all interlocutory orders related to discovery or other preliminary matters. For reasons of fairness and judicial efficiency, orders of this type should not be appealable indiscriminately. If they were, defendants' rights to a speedy trial could be subverted, and the courts of appeal would be deluged.[19]

The Navy court in *Ostrander* apparently chose to follow the expansive interpretation applied by the majority of the federal circuits rather than the narrow interpretation taken by the First Circuit in *Beck*.

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[16]As a consequence, government appeals from orders suppressing or excluding evidence are not limited to search and seizure situations. The government has appealed from pretrial orders excluding prospective trial testimony of government witnesses. *See, e.g.*, United States v. Cannone, 528 F.2d 296 (2d Cir. 1975); United States v. Percevault, 490 F.2d 126 (2d Cir. 1974); United States v. Battisti, 486 F.2d 961 (6th Cir. 1973) (exclusion of testimony if government failed to comply with defense discovery request for the names of government witnesses). *See also* United States v. Horwitz, 622 F.2d 1101 (2d Cir. 1980) (government could appeal judge's order that certain defense witnesses be immunized or else it would exclude the testimony of witnesses immunized for the government's case). In United States v. Flores, 538 F.2d 939 (2d Cir. 1976), the district court issues an order in a prosecution for conspiracy to sell narcotics which prohibited the government from introducing evidence of prior acts and statements of the defendant's condition treaty between Spain and the United States. The defendant argued that the trial judge's ruling did not constitute a suppression order within the meaning of 18 U.S.C. §3731. The court of appeals disagreed, finding that the order constituted an evidentiary ruling which determined the manner in which the conspiracy offense could be proven and held that it was an appealable ruling. Finally, United States v. Martinez, 681 F.2d 1248 (10th Cir. 1983), is another example of a government appeal from a trial judge's ruling which excluded evidence of other crimes committed by the accused, as well as evidence of flight.

[17]646 F.2d 4 (1st Cir. 1981).

[18]*Id.* at 5.

[19]*Id.* at 7.

United States v. Tucker

In *United States v. Tucker*,[20] the government appealed the trial judge's dismissal of a charge and specification based on the lack of speedy trial. *Tucker* highlights the fact that mixed questions of law and fact will often be present in government appeals. As the appellate court may act only with respect to matters of law, the government's success may depend upon the appellate court's ability to adhere to law to determine legal error while adhering to the trial court's findings of fact. No doubt this will be a distinction without a difference in some cases. In *Tucker*, the trial judge set forth findings of fact supporting his ruling. The Navy-Marine Court of Military Review nevertheless reversed the trial judge concluding that while

> [W]e share the military judge's dissatisfaction with the government's attention to this case, we do not agree with his decision to dismiss the charges. We do not presume to differ with him over an evaluation of the facts, as we acknowledge that our inquiry is limited solely to matters of law. R.C.M. 908(c)(2). Instead, we conclude that he misperceived the decisive legal issue and thus applied the wrong legal analysis to the facts.[21]

An issue likely to be litigated in *Tucker* upon remand wil be the impact of a government appeal upon the accused's right to speedy trial. The speedy trial standard set forth in R.C.M. 707 generally provides that trial should be "within 120 days after notice to the accused of preferral of charges under R.C.M. 308 or the imposition of restraint under R.C.M. 304, whichever is earlier." However, in determining whether the right to a speedy trial has been violated, the rule excludes that time necesary for "any appeal filed under R.C.M. 908 unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit. . . ."[22]

A similar exclusion exists in the federal civilian statute.[23] In *United States v. Jackson*,[24] the government appealed from a district court order dismissing an indictment for, *inter alia*, lack of a speedy trial. In calculating the period of delay, the court of appeals held that the period of delay attributable to the government's appeal under 18 U.S.C. §3731 should not be considered. Finding the appellate delay to be "both unavoidable and justifiable" to the fair administration of justice, the court noted that

> [I]n a similar context, the court in *United States v. Bishton*, 150 U.S. App. D.C. 51, 463 F.2d, 887, 890 (1972) excluded for speedy trial purposes the delay resulting from appellate review of an interlocutory trial order on the ground that "[t]he right of the government to appeal decisions in the defendant's favor before jeopardy attaches is designed to protect the interest of society in lawfully prosecuting criminal offenders. . . ." Although the Government should have pressed its appeal in a more timely fashion, we cannot find that this indicates that the appeal was taken in bad faith or for the sole purpose of delay, and in the absence of such findings, to put the onus of appellate delay on the Government would severely infringe the Government's right to appeal.[25]

The legislative history of the government's new right to appeal discloses that the drafters

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[20]Misc. Dkt. No. 84-07 (N.M.C.M.R. 31 Dec. 1984).

[21]*Id.* slip. op. at 3.

[22]R.C.M. 707(c)(1)(D).

[23]18 U.S.C. §3161(h)(1)(E) (1982) provides:

> The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerned the defendant, including, but not limited to—
>
> . . . .
>
> (E) delay resulting from any interlocutory appeal.

[24]508 F.2d 1001 (7th Cir. 1975).

[25]*Id.* at 1005 [footnote omitted].

intended to follow federal civilian practice.[26] In a recent case, however, the Ninth Circuit applied a balancing test to determine whether to exclude the time required to pursue an interlocutory appeal. The court concluded that a *per se* approach, excluding all delay caused by interlocutory appeals, accorded "too little respect" to the accused's right to a speedy trial.

> [I]t seems analytically more sound to count the time taken by the government's appeal within the period of delay, and then to assess the justifications for that appeal under the second step of the *Barker v. Wingo* analysis: that dealing with "reasons for the delay." The importance of protecting the government's statutory right of appeal in a given case can be weighed and ultimately placed in the balance against the damage to defendants' sixth amendment interest. This latter, more flexible methodology appears to have been the one selected by the Fifth Circuit in *United States v. Herman*, 576 F.2d 1139, 1146 (5th Cir. 1978), and we prefer it.[27]

[26]Senate Armed Services Committee Report No. 98-53, 98th Cong., 1st Sess. 23 (1983) states:

> Article 62(c), which excludes the appeal from computations of time in deciding speedy trial motions, is taken from 18 U.S.C. §3161(h)(1)(E), which excludes interlocutory appeals from speedy trial computations in federal civilian criminal trials. In federal civilian criminal trials, the law provides for sanctions in the event of frivolous or dilatory motions. *See* 18 U.S.C. §3162. The Committee directs that the same standards used in judging the appropriateness of such sanctions be applied to determine whether the government is entitled to the benefit of the exclusion in Article 62(c).

[27]United States v. Loud Hawk, 741 F.2d 1184, 1190-91 (9th Cir. 1984). Similar concerns have been voiced in the military setting.

> If the Court of Military Appeals decides to adopt R.C.M. 707 as the military speedy trial standard and abandon *Burton* [21 C.M.A. 590, 45 C.M.R. 166 (1971)] an accused could spend months or even years in pretrial confinement if a government appeal stays the proceedings and the appeal works it way to the Supreme Court.

Criminal Law Division, TJAGSA, *The 1984 Manual for Courts-Martial: Significant Changes and Potential Issues*, The Army Lawyer, July 1984, at 1, 23.

Once again, the Navy court has apparently chosen the *per se* approach criticized by the Ninth Circuit but followed by the majority of the federal circuits. The Navy position is sounder because the trial counsel must attest that the appeal is taken in good faith, and a finding to the contrary would prevent the government from excluding the time for speedy trial purposes.

United States v. St. Clair

On the same day that *United States v. Tucker*, was decided, another panel of the Navy-Marine Court of Military Review decided *United States v. St. Clair*,[28] a government appeal from a trial judge's ruling which suppressed the accused's confession. As in *Tucker*, the court recognized its inability to independently make findings of fact. Nevertheless, the court reversed the trial judge by artfully characterizing the issue as a question of law.

> We will not dispute the military judge's finding that Special Agent McGlynn's remarks concerning pretrial restriction constituted at least *some* inducement for Petty Officer St. Clair to make his statement. The crucial question is whether he erred as a matter of law in determining that this was an *unlawful* inducement. We believe that he did so err.[29]

United States v. Scholz

The most extensive discussion to date about the scope of the government's right to appeal under UCMJ art. 62 is contained in *United States v. Scholz*.[30] In *Scholz*, the trial judge suppressed the results of urinalysis performed at a non-DOD certified laboratory because it allegedly violated a DOD directive governing urinalysis testing. The defense argued that the court of military review lacked jurisdiction to entertain the government's appeal because the suppressed evidence was not, as contemplated in the statutory language of R.C.M. 908, "sub-

[28]___M.J. ___(N.M.C.M.R. 31 Dec. 1984).

[29]*Id.* slip op. at 4.

[30]___M.J. ___(N.M.C.M.R. 31 Dec. 1984).

stantial proof of a fact material to the proceeding." The defense argued that due to the cumulative nature of the urinalysis evidence, it could not be characterized as "substantial proof."

This was a case of first impression for the Navy-Marine Court of Military Review. The court referred to federal decisions because the language of Article 62 was intended to parallel that contained in the federal government appeals statute. The court emphasized that the appropriate focus was whether the government believed the evidence was sufficiently important to appeal the trial judge's ruling:

> Once Congress acted to allow appeals by the United States, they manifested the intent to remove all statutory and common law barriers. *Arizona v. Manypenny*, 451 U.S. 232 (1981). This, of course, does not preclude a challenge on constitutional grounds, such as double jeopardy. Interpretations invoking broad construction have been given to the government's right to appeal from interlocutory orders suppressing or excluding evidence. *United States v. Humphries*, 636 F.2d 1172 (9th Cir. 1980). It is not necessary that the evidence suppressed be the only evidence in the case. *See United States v. Helstoski*, 442 U.S. 477 (1979). So long as it is alleged that the evidence is substantial, the Petitioner will come within the appellate court's jurisdiction. If the essence of the appeal expresses the substantial nature of the evidence, the wording of the appeal need not track the statutory, 'substantial. . .', language. *In re Special September 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980).
>
> We are not unmindful of the concerns of the drafters of this legislation that excessive use of this right to appeal would impose an excessive burden upon all aspects of the military justice system. *See*, Analysis to R.C.M. 908. However, we are constrained to interpret the provision in accordance with applicable law. Therefore, short of a constitutional bar, the United States has a broad right of appeal under Article 62, U.C.M.J. While this may mean that many rulings are potentially eligible for appellate review, from a practical standpoint, the military's interest in preventing a backlog within its own system will act to prevent an abuse of the right. Any further limitation on the exercise of appellate review is an area for legislative, not judicial action.[31]

Both R.C.M. 908 and 18 U.S.C. §3731 require the prosecutor to certify that the appeal is not being taken for the purpose of delay and that the suppressed evidence is substantial proof of a fact material in the proceeding. Good faith representations in this regard should not pose any problem because the court will be reluctant to speculate whether the government's assessment of its need and the importance of the suppressed evidence is accurate. As the court in *Scholz* stated:

> We are not persuaded by the Respondent's argument that the evidence was cumulative. In an interlocutory appeal, it is beyond the scope of this Court to speculate as to what weight or importance a particular piece of evidence might have at trial. It is sufficient that the petitioner believes that the evidence is significant enough to seek reversal of a military judge's exclusionary ruling rather than continue at trial with whatever other evidence that might be available. Accordingly, we hold that this Court has jurisdiction to hear Petitioner's appeal.[32]

United States v. Howard

United States v. Howard[33] is the only government appeal to date which has been decided by the Army Court of Military Review.[34] In

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[31] *Id.* slip op. at 4.

[32] *Id.*

[33] ___M.J. ___(A.C.M.R. 10 Jan. 1985).

[34] Two other Army cases, one involving suppression of evidence and the other dealing with retrial following withdrawal of charges, were considered but finally rejected as possible government appeals. In several other cases, government appeals were avoided after the military judge reversed the adverse ruling or order when asked to reconsider.

Howard, the court confronted a pure question of law concerning whether the trial judge correctly determined that the act of delivering an accused's discharge certificate to him effectively terminated *in personam* jurisdiction or whether, under existing law, the discharge had been legally withdrawn before it was effective. The court upheld the government's appeal and, in an opinion authored by Senior Judge Marden, concluded that the intention of the Army was not to discharge the accused until 2400 hours on the day in question, regardless of the time of delivery of the discharge certificate to the accused.

As the Army's first government appeal, the time it took to litigate the *Howard* appeal should be of interest to trial counsel. The trial judge dismissed the charges and specifications on 14 November 1984, the government's appellate brief was filed with A.C.M.R. on 10 December 1984 (26 days later), oral argument was held on 7 January 1985 (54 days later), and the Army Court of Military Review issued its opinion on 10 January 1985 (57 days).[35]

The factual scenario (stipulated to by the parties at trial) and the legal issue involved make the *Howard* case a possible candidate for further appellate review before the Court of Military Appeals and, possibly, the United States Supreme Court.[36]

[35]In appeals filed before ACMR, the respective parties will be represented by appellate government and defense counsel. Appellate government counsel are tasked to "diligently prosecute" the appeal which will "have priority over all other proceedings before the Court of Military Review." R.C.M. 908(c)(2). The diligence demanded of government appellate counsel is reflected in the following extract from Clerk of Court Memorandum No. 11, 3 Aug. 1984, concerning the filing of government appeals before the United States Army Court of Military Review:

> The representative of the Government designated by The Judge Advocate General shall promptly decide whether to file the appeal with the Court of Military Review. Except for good cause shown, the Government shall file such an appeal no later than 30 days after the military judge's ruling or order. A brief on behalf of the United States shall be prepared in the manner prescribed by Rule 16, and filed with the appeal *no later than 30 days after the military judge's ruling or order.*

[36]Depending on the outcome of the appeal to the court of military review, R.C.M. 908(c)(3) provides that the accused may petition for review by, or The Judge Advocate General may certify a question to, the United States Court of Military Appeals. If the appeal is reviewed by the Court of Military Appeals, further review is available to either the accused or the government through a writ of certiorari to the United States Supreme Court under R.C.M. 1205.

United States v. Browers

Another recent government appeal filed in *United States v. Browers*,[37] an Army case, could result in an even more extensive analysis of R.C.M. 908. Its importance for trial counsel cannot be overstated.

The accused was charged with four specifications of lewd and lascivious acts by touching male subordinates on the buttocks and in the groin area. The charges were referred to a BDC special court-martial and Article 39(a) sessions were held on 17 and 18 October, 29 November, and 5 December 1984, during which various motions were litigated. Additionally, the military judge granted the defense request to produce certain witnesses from CONUS and on at least two occasions the defense moved to abate trial proceedings until January 1985 so that another defense witness, hospitalized in the United States at the time, could be produced at trial in Germany. The military judge, however, considered a stipulation of the expected testimony of this latter witness, and a trial date was set for 5 December 1984.

The only witnesses to the offenses were the victims. Unbeknownst to the trial counsel, one victim was permitted to depart Germany for emergency leave to CONUS on 20 November 1984. Two days before the scheduled trial date of 5 December 1984, trial counsel learned that the witness was on emergency leave and not expected to return until 20 December 1984. The trial counsel attempted unsuccessfully to contact the military judge to advise him of the situation. A message was left for the military judge at his office, which was located at a significant distance from the site of trial, stating that the witness had been on emergency leave in the United States since 20 November 1984

[37]Misc. Dkt. No. 1985/1 (government appellate brief filed before the United State Army Court of Military Review on 18 Jan. 1985).

and that the government would request a continuance.

Complicating matters, trial counsel learned on 4 December 1984 that the remaining victim-witness was absent without leave from his unit. Although the witness was not present for duty on 3 December 1984, the unit did not officially report him AWOL until 0600 on 4 December 1984. The unit first sergeant advised trial counsel that the witness reportedly had been seen with his girlfriend in the local vicinity and that efforts were underway to locate him.

On 4 December 1984, trial counsel again attempted, unsuccessfully, to contact the military judge. Trial counsel did contact his supervisory judge who advised her both that the trial judge was on pass and that he would not call him at home.

On 5 December 1984, the trial counsel requested a continuance until approximately 21 December 1984, the day after the one unavailable witness was expected to return from emergency leave. Notwithstanding earlier defense requests that the trial proceedings be abated until January 1985, the defense now demanded immediate trial. The trial judge denied the government's motion for a continuance. When asked to explain his ruling, he reasoned as follows:

> The decision to grant or not grant a continuance is in the discretion of the military judge and my discretion leads me to the conclusion that a continuance is not warranted under the circumstances.
>
> At the last 39a session of this case, when we litigated the disposition of the Charges in this case, one of the government's positions was that the administrative burden and logistical burden and expense and difficulty in prosecuting the case would not be a factor in the decision to refer this case for trial. Now, the government's coming in and saying, 'We're having trouble getting our witnesses together because they're scattered all over the world and we have to have delays in this case.'
>
> There's no reason to believe that Miller [the witness/victim] will be available any time in the foreseeable future, despite the fact that he was observed in the area. He may be anywhere, as far as the government knows. If it was a matter of waiting a couple weeks, the chances are that he would show up; but he may not and then we're a couple of weeks down the line and no better off at that point.
>
> The government, although perhaps not the trial counsel in this case, knew that Miller (sic) was needed to be available as a witness in this case and, although emergency leave is unavoidable, there is a burden on the government to keep a string on government witnesses and to, at least, know that they will not be available for a particular date or at a particular time.[38]

At this juncture, the trial counsel requested a brief recess to confer with the chief of military justice who, in turn, advised trial counsel to request a delay to consider an appeal of the trial judge's ruling. Back on the record, the trial counsel requested a delay, citing R.C.M. 908(b)(1),[39] to determine whether to formally appeal the military judge's ruling. The trial counsel stated that the government would make its decision in approximately twenty-four hours (less than the seventy-two hour period authorized in R.C.M. 908(b)(2)). The military judge denied the requested delay. Explaining his ruling, the trial judge stated that he had denied only a requested continuance; he did not consider it an appealable ruling because it did not "terminate" the proceedings or "exclude" any evidence. To hold otherwise, the military judge continued, the government could defeat a trial court's ruling simply by requesting an appeal, and thereby obtain its continuance using

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[38] *United States v. Browers*, Record of Trial.

[39] R.C.M. 908(b)(1) states:

> *Delay.* After an order or ruling which may be subject to an appeal by the United States, the court-martial may not proceed, except as to matters unaffected by the ruling or order, if the trial counsel requests a delay to determine whether to file notice of appeal under this rule. Trial counsel is entitled to no more than 72 hours under this subsection.

that mechanism. To emphasize that the government was acting in good faith, the trial counsel promptly stated for the record that the government was not seeking to obtain a *de facto* continuance. Trial counsel asserted that the government legitimately believed the trial judge's ruling was appealable under R.C.M. 908. The military judge declined to change his ruling. When trial counsel asked for another recess, it was also denied. The following colloquy then ensued:

> MJ: Captain Werner, do you have an opening statement? (Pause.)
> TC: Your Honor, what is the exhibit number of the statement made by Sergeant Browers?
> MJ: Prosecution Exhibit 2.
> TC: And that's in evidence?
> MJ: Yes.
> TC: The government does not have an opening statement.
> MJ: Captain Warner, do you have an opening statement?
> DC: The defense will reserve, Your Honor.
> MJ: You may call your first witness.
> TC: The government has no witnesses to present at this time.
> MJ: Do you wish to present any other evidence?
> TC: Well, Prosecution Exhibit 2, which is already in evidence. (An uncorroborated confession of the accused)
> MJ: Does the government rest then?
> TC: Yes, sir.
> MJ: Captain Warner, does the defense desire to present any evidence?
> DC: No, Your Honor.
> MJ: Captain Werner, do you desire to make any argument? (Pause.)
> TC: No, sir.
> MJ: Captain Warner?
> DC: Your Honor, the government's failed in its burden of proof. All you have before you is an uncorroborated so-called confession. The defense contends that that is not sufficient to meet the burden of proof that the government has in this case.
> MJ: Sergeant Browers, would you and Captain Warner please rise.[40]

Thereafter, the military judge entered findings of not guilty.

Two days later, the staff judge advocate decided to appeal the trial judge's ruling. Because the trial judge could not be contacted, formal notice of the government's intent to appeal was served on a substitute military judge.[41]

The *Browers* case squarely raises the question of the extent of trial counsel's authority under R.C.M. 908(b)(1) to request a delay to determine whether to file notice of appeal under [the] rule. The analysis to R.C.M. 908 expressly provides that this particular subsection "provides the trial counsel with a mechanism to ensure that further proceedings do not make an issue moot before the Government can file notice of appeal."[42] Countenancing the military judge's action in *Browers* would defeat this purpose because the trial judge arrogated for himself the determination of whether his ruling or order was appealable. In essence, the military judge accorded the trial counsel's request under R.C.M. 908(b)(1) no greater weight than that of a request for reconsideration.

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[40] *United States v. Browers*, Record of Trial.

[41] R.C.M. 908(b)(3) provides:

> *Notice of Appeal.* If the United States elects to appeal, the trial counsel shall provide the military judge with written notice to this effect not later than 72 hours after the ruling or order. Such notice shall identify the ruling or order to be appealed and the charges and specifications affected. Trial counsel shall certify that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

Under the circumstances, service upon a substitute judge should not pose any problem inasmuch as there was substantial compliance with the above provision. Although it did not become an issue, service of the formal notice of appeal in *United States v. Howard* was made upon a noncommissioned officer who signed receipt as the "designated representative" of the trial judge. Additionally, federal cases have held that the failure to file the certification within the time prescribed is not a juridictional defect. *See* Meier v. Keller, 521 F.2d 548, 553 (9th Cir. 1975); United States v. Wolk, 466 F.2d 1143, 1146 n.2 (8th Cir. 1972); United States v. Kleve, 465 F.2d 187, 189-90 (8th Cir. 1972); United States v. Welsch, 446 F.2d 220, 224 (10th Cir. 1971).

[42] *See* R.C.M. 908 analysis.

Certainly, competing interests are present in *Browers*. Trial counsel must be free to determine if a government appeal will be pursued. On the other hand, the military judge must be able to control his docket and the trial proceedings. The situation in *Browers* demonstrates why the government's right to request a delay to determine whether to file notice of appeal cannot be subordinated to a preliminary determination of appealability by the military judge. If, as the trial judge's reasoning in *Browers* reflects, the underlying concern is that the unfettered authority of trial counsel could result in the abuse of government appeals, it seems more fitting to punish the offender rather than diminish the right to appeal itself. Appropriate sanctions for such actions similar to those applied in the federal civilian sector can be established.[43] Deliberate abuse of authority under R.C.M. 908 may even constitute an offense under the Uniform Code of Military Justice.[44]

In support of trial counsel's authority, it would seem that appellate government counsel have a two-prong argument. First, the government could contend that it was a usurpation of authority for the miltiary judge to deny the delay requested under R.C.M. 908(b)(1). The rule is designed to promote government consideration of appeals, not to permit military judges to frustrate the government's attempt to exercise its rights. This position is supported in the legislative history of UCMJ art. 62. The Senate Armed Services Committee report provides that

> The determination as to whether the appeal meets the criteria of Article 62, as proposed, will be subject to review by appellate authorities. The decision to appeal will be made by the trial counsel or a superior as representative of the government. The Manual for Courts-Martial and service regulations will provide procedural requirements for approval by appellate counsel, who represent the government before the Courts of Military Review under Article 70, before an appeal is filed.[45]

The government could also argue that the trial counsel's request for delay was tantamount to a withdrawal without prejudice of the

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[43]*See* 18 U.S.C. §3162(b) (1982) which provides:

> In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney as follows:
>
> (A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;
>
> (B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such a defendant;
>
> (C) by imposing on any attorney for the Government a fine of not to exceed $250;
>
> (D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or
>
> (E) by filing a report with an appropriate disciplinary committee.
>
> The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

[44]UCMJ art. 98 provides:

> Any person subject to this chapter who—
>
> (1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or
>
> (2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused;
>
> shall be punished as a court-martial may direct.

[45]Senate Armed Services Committee Report, *supra* note 26, at 23.

charges and specifications. In *Satterfield v. Drew*,[46] the Court of Military Appeals recognized that trial counsel acts as the agent for the convening authority who has an interest in the prosecution of crimes. As a means to protect that interest, the court acknowledged trial counsel's authority to withdraw charges without prejudice. The situation in *Satterfield v. Drew* bears remarkable similarity to the dilemma confronting trial counsel in Browers:

> At the Article 39(a) session trial counsel was confronted with a judge's ruling which apparently was unforeseen and which made it impossible for him to proceed successfully with trial of the case at that time. Moreover, he had been denied a requested recess to allow consultation with the convening authority about the judge's ruling. If he went to trial and the charges were dismissed for lack of evidence, the accused would be entitled to the benefits flowing from the attachment of jeopardy and could not be tried again.[47]

The Court of Military Appeals was obviously mindful that trial counsel could not appeal from an adverse ruling on a motion to suppress at the time of its decision. Indeed, by way of footnote, Chief Judge Everett recognized that R.C.M. 908 would have provided trial counsel with another alternative to the perplexing situation.[48]

Based on what transpired at trial, the Army Court of Military Review will be strained to find that a withdrawal of charges occurred in *Browers*. Yet, the *Satterfield* case also bolsters the government's ancillary argument that judicial proceedings conducted after trial counsel requested a delay should be considered a nullity. In *Satterfield*, the Court of Military Appeals concluded that trial proceedings following trial counsel's withdrawal without prejudice were a nullity.[49] By analogy, any proceeding conducted after trial counsel properly invokes a delay pursuant to R.C.M. 908(b)(1) should be considered, with respect to the affected charges and specifications, a nullity.

Another issue presented in *Browers* is whether the trial judge's denial of the government's request for a continuance constitutes an appealable ruling or order. The court will have to determine if the trial judge's ruling, in the language of UCMJ art. 62, terminated the proceedings or excluded evidence that was substantial proof of a material fact in the proceeding. Generally, granting a continuance is within the sound discretion of the military judge and reversal is required only where there has been an abuse of that discretion.[50] However, where the request for a continuance is inextricably joined with the government's ability to present its case-in-chief, it should be considered an appealable issue.

Although not directly on point, there have been cases decided where the trial judge's denial of a continuance was considered to be appealable under the federal civilian government appeal statute. For example, in *United States v. Robinson*,[51] the trial judge granted a defense motion to suppress the accused's pretrial statement to federal agents. The government filed a timely notice of appeal under 18 U.S.C. §3731 and simultaneously filed a motion for continuance of the trial proceedings. The trial judge denied the motion for continuance and called the case for trial, notwithstanding the government's assertion that it was not prepared to try the case without the suppressed evidence. The trial court dismissed the case for want of prosecution. The government appealed both the trial judge's denial of the requested continuance and the dismissal of the indictment.

The Fourth Circuit first addressed the issue of whether the trial judge had abused his discretion by refusing to grant the government a

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[46]17 M.J. 269 (C.M.A. 1984).

[47]*Id.* at 273.

[48]*Id.* at 273 n.4.

[49]*Id.* at 274.

[50]United States v. Thomson, 3 M.J. 271 (C.M.A. 1977); United States v. Kinard, 21 C.M.A. 300, 45 C.M.R. 74 (1972); United States v. Daniels, 11 C.M.A. 52, 28 C.M.R. 276 (1959).

[51]593 F.2d 573 (4th Cir. 1979).

continuance pending appeal; it concluded that he had. After emphasizing the liberal construction that Congress intended for the government appeals statute, the court reasoned:

> In effect, the district judge's ruling places the government in the same dilemma it faced prior to the 1968 amendment of 18 U.S.C. §3731. The government either must go to trial without evidence which may be crucial to its case or it must dismiss the indictment. If the government goes to trial without the evidence and the defendant is acquitted, then an appellate decision may not be obtained since the defendant is constitutionally protected from another trial. We think the intended course in the ordinary case of this type is to grant a continuance pending appeal. Otherwise, the government is not allowed the benefit of appellate review which Congress clearly intended when it amended §3731.[52]

Similarly, in *United States v. Clinger*,[53] the trial judge granted a defense motion to suppress tape recorded pretrial statements of the accused because of apparent unexplained gaps in the tape recording. The government requested a continuance until the following day so that a witness could be presented to testify about how the tape recorder was operated. The motion for continuance was denied. The government appealed, and the Fourth Circuit determined that the trial judge had abused his discretion by refusing to continue the case so that the government witness could be brought in to testify on the suppression motion. The court analogized the government request to a defense requested delay for the procurement of a witness and concluded that the government had satisfactorily met its burden in justifying the request for a continuance. Elaborating on its rationale, the court reasoned:

> Although the expediency of judicial resolution is a valid concern and the scheduling of trials an important element of the administration of justice, we must bear in mind that the ultimate goal of our system is justice. Not only should the rights of the defendant be protected through the use of judicial discretion, but the interests of society should be furthered by punishing those who break its laws. In this case, granting a continuance for one day would have been a very minor judicial inconvenience. On the other hand, the evidence that was excluded from introduction by order to the court could have been of valuable probativeness in the search for the truth.[54]

The final issue present in *Browers* will be whether the accused is protected from further prosecution based on double jeopardy considerations.[55] Federal case law provides persuasive authority demonstrating that such an impediment should not bar retrial.

In *United States v. Scott*,[56] the Supreme Court carefully delineated the circumstances under which a government appeal would not violate the Double Jeopardy Clause. In *Scott*, the defendant moved to dismiss two counts in a three count indictment on grounds of preindictment delay. At the close of all the evidence, the trial judge granted the motion and submitted the third count to the jury. Thereupon, the government appealed the dismissal of the first two counts under 18 U.S.C. §3731. The appeals

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[52] *Id.* at 576.

[53] 681 F.2d 221 (4th Cir. 1982).

[54] *Id.* at 223.

[55] Generally, in federal cases, jeopardy attaches when the jury is sworn and empaneled. Illinois v. Somerville, 410 U.S. 458 (1978); Downum v. United States, 372 U.S. 734 (1963). This rule was made applicable through the fourteenth amendment to the respective states by the Supreme Court in Crist v. Bretz, 437 U.S. 28 (1978). In a trial by judge alone, jeopardy attaches when the court begins to hear evidence. Wade v. Hunter, 336 U.S. 684 (1969); *Serfass v. United States.* In the military by contrast, UCMJ art. 44(c) views the introduction of evidence as the crucial point when jeopardy attaches, regardless of whether the trial is by military judge alone or by members. *See also* R.C.M. 907(b)(2)(c). The Court of Military Appeals has upheld this view. *See* United States v. Cook, 12 M.J. 448 (C.M.A. 1982); United States v. Wells, 9 C.M.A. 509, 26 C.M.R. 289 (1958); United States v. Ivory, 9 C.M.A. 516, 26 C.M.R. 296 (1958).

[56] 437 U.S. 82 (1978).

court affirmed holding that double jeopardy would bar retrial and, therefore, the appeal was improper. However, the Supreme Court reversed and held that double jeopardy does not bar retrial after dismissal by a trial judge if two prerequisites are met: the trial court must not have acted on the insufficiency of the evidence to establish guilt; and the defendant, not government misconduct, must be responsible for the second prosecution. Expanding on the issue, the court stated:

> We think that in a case such as this, the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant.
>
> [I]n the present case, respondent successfully avoided a submission of the first count of the indictment by persuading the trial court to dismiss it on a basis which did not depend on guilt or innocence. He was thus neither acquitted nor convicted because he himself successfully undertook to persuade the trial court not to submit the issue of guilt or innocence to the jury which had been empaneled to try him.[57]

In short, a government appeal does not violate the Double Jeopardy Clause if the trial judge dismisses the charges on grounds unrelated to the guilt or innocence of the accused, and the accused, not the government, invited the court to terminate the proceedings.[58]

Returning to *Browers*, it seems evident that the government could argue that jeopardy did not attach because no evidence was properly before the court to consider. Although the trial counsel referred to the accused's pretrial admission, Military Rule of Evidence 804(g) expressly precludes that from being considered as evidence against the accused on the question of guilt or innocence without independent corroborating evidence. Against this background, any argument by the accused that the government's case against him was put to the test would be specious. What transpired in *Browers* hardly warrants classification as a trial on the merits.

Perhaps the best way to dispose of the double jeopardy issue is to argue that what actually transpired in *Browers* was tantamount to a dismissal. The federal circuit decisions make clear that the effect of the trial judge's ruling, not the judge's label, characterizes the action.[59] For example, in *United States v. Gonzales*,[60] a material witness was allowed by the government to return voluntarily to Mexico in lieu of deportation and, therefore, was "unavailable" to the defendants for their trial for violating immigration laws. The court granted a defense motion to dismiss the indictment. The government appealed this ruling, arguing that the acquittal was one in form only and that the appeal was therefore not barred by the Double Jeopardy Clause of the fifth amendment. The court of appeals agreed with the government's position and held:

> Although there is a reference in the district court's judgment to the evidence adduced by the government during the three days of trial, the record does not plainly demonstrate that the district court evaluated the government's evidence and determined that it was legally insufficient

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[57] *Id.* at 98-99.

[58] Consistent with the *Scott* analysis, government appeals have been held not to violate the Double Jeopardy Clause when based on such legal grounds as insufficiency of the indictment on its face, United States v. Pecora, 484 F.2d 1289 (3d Cir. 1973), United States v. McGough, 510 F.2d 598 (5th Cir. 1975); Preindictment delay in the prosecution, United States v. Wilson, 420 U.S. 332 (1975); unavailability of key witnesses, United States v. Gonzales, 617 F.2d (9th Cir. 1980), United States v. DeDiego, 511 F.2d 818 (D.C. Cir. 1975); and dismissal because of the government's refusal to comply with a pretrial order requiring disclosure of its witnesses to be called at trial, United States v. Jackson, 508 F.2d (7th Cir. 1975).

[59] *See supra* note 14. *See also* United States v. Kehoe, 516 F.2d 78 (5th Cir. 1975) (trial judge expressly labeled his judgment an "acquittal"; however, the Fifth Circuit held it amounted only to a legal ruling with no bearing on innocence or guilt).

[60] 617 F.2d 1358 (9th Cir. 1980).

to sustain a conviction. *United States v. Scott*, 437 U.S. at 97, 98 S. Ct. at 2197. Rather, the record before us clearly demonstrates that the order was based on constitutional grounds arising from the unavailability of potential material witnesses. *See United States v. Appawoo*, 553 F.2d 1242 (10th Cir. 1977). The acquittal therefore was in substance an order of dismissal, and as such is appealable. *United States v. Scott, supra.*[61]

Close scrutiny of the trial judge's action in *Browers* indicates that he fundamentally believed that the accused had been deprived of a speedy trial. Viewed in this light, his finding of a lack of speedy trial is clearly appealable, and retrial is not barred by former jeopardy if the trial judge's ruling is reversed.[62]

Conclusion

In the relatively short time since the creation of the government's right to appeal certain adverse rulings at trial, a considerable amount of appellate activity under R.C.M. 908 has already occurred. From a trial counsel's perspective, the initial cases decided under R.C.M. 908 represent a significant advancement from days past when discretionary rulings by the trial judge were essentially immune from any attack. The wide variety of rulings already appealed (*i.e.*, suppression orders, speedy trial rulings, discovery requests tantamount to motions to suppress, and jurisdictional questions), represent the broad area in which R.C.M. 908 is a potential tool for more effective advocacy. The initial successes also dispel some of the early concerns about how this new right to appeal would impact upon trial proceedings. It seems clear that because all the cases decided thus far have been favorable to the government, R.C.M. 908 has not been resorted to in spurious issues. Indeed, in many of the cases, the government's right to appeal has been the only way to salvage the case against the accused. While many issues pertaining to this new right have yet to be resolved, as reflected in the *Browers* case, the first series of successful government appeals before the various courts of review have firmly established that R.C.M. 908 is not merely a theoretical means of appellate relief. It is a very real remedy, and it is incumbent upon trial counsel to be mindful of its use at the trial level.

[61] *Id.* at 1362. *See generally* Annot. 30 A.L.R. Fed. 655; Atlas, *Double Jeopardy and Government Appeals of Criminal Dismissals*, 52 Tex. L. Rev. 303 (1974); *Government Appeals of "Dismissals" In Criminal Cases*, 87 Harv. L. Rev. 1822 (1974).

[62] *See* United States v. Ware, 1 M.J. 289 (C.M.A. 1976); United Staes v. Germono, 16 M.J. 987 (A.C.M.R. 1983).

Reader Note

[TCAP Note: Have you ever considered whether you could use the accused's non-cooperation in identifying his drug source as a basis for aggravation during sentencing? Captain James M. Hohensee, Chief Trial Counsel, 4th Inf Div (M), Fort Carson, Colorado, suggests that this is a proper basis for aggravation and cites a number of federal cases as authority to support his proposition. Below is his memorandum which suggests that trial counsel should present evidence of non-cooperation as a factor to consider during sentencing]

1. A lack of willingness on the part of the accused to assist society in identifying the purveyors of drugs has been recognized as a matter in sentencing in the federal courts for a number of years. In *Roberts v. United States*,[1] the United States Supreme Court held that "[u]nless his silence is protected by the privilege against self-incrimination . . . the criminal defendant, no less than any other citizen, is obliged to assist the authorities."[2] This case focused on whether a federal district court had properly considered evidence of the accused's refusal to cooperate with investigating officials. The Supreme Court reasoned that it was the duty of every citizen to report criminal conduct and stated that "gross indifference to the duty to report criminal conduct remains a badge of irresponsible citizenship."[3] The Court addi-

[1] 445 U.S. 552 (1980).

[2] *Id.* at 558.

[3] *Id.*

tionally remarked, "By declining to cooperate, petitioner rejected an 'obligatio[n] of community life' that should be recognized before rehabilitation can begin."[4] The Court also held that reasons the accused may have for failing to disclose, such as fear of reprisal, should be voiced by the accused at trial. According to the Court, this would assist in evaluating the weight of the evidence of the accused's failure to identify his source of illicit drugs.

2. The use of non-cooperation as a factor in sentencing has also been upheld in a number of federal circuit courts of appeal.[5]

3. The *Roberts* opinion was discussed by the Second Circuit in *United States v. Bradford*.[6] In *Bradford*, the court held that the failure to identify one's source may not be used to increase a sentence, but, rather, may be considered along with other factors in determining an appropriate sentence. This appears to be analogous to the use of an accused's willful misrepresentations as a factor in sentencing. The *Bradford* holding further provided that when the defense claims that non-cooperation is due to fear, the burden is on the defense to adduce facts in support of its claim because "[t]he defendant presumably knows the circumstances (e.g., threats to himself or others) upon which he bases his alleged apprehension."[7]

4. Military trial counsel should be particularly alert to the circumstances where a military accused refuses to cooperate with law enforcement authorities in identifying his source(s) of illicit contraband. Law enforcement authorities should be advised by trial counsel to insure that lack of cooperation by military accuseds in the investigation of any criminal activity, particularly where the evidence indicates that the accused may be helpful in subduing an ongoing criminal activity, is noted on agent investigative reports (AIR) or other similar reports.

5. Within the military, lack of cooperation by an accused in assisting an investigation may be seen either as a matter in aggravation or, at least, as evidence in rebuttal to the rehabilitative potential of the accused. The Rules for Courts-Martial recognize that trial counsel may present evidence as to any aggravating circumstance directly relating to or resulting from the offenses of which the accused has been found guilty.[8] Certainly, the federal case authority indicates that lack of cooperation by an accused is relevant to accused's rehabilitative potential.

7. Finally, it should be recognized that the rationale of *Roberts* and *Bradford* does not exclusively apply to cases involving illicit drug activity. These cases apply to any situation where the accused's "citizenship" and "rehabilitation" are relevant factors in assessing a proper punishment.

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[4]*Id.*

[5]*See* United States v. Tracey, 675 F.2d 433 (1st Cir. 1982); United States v. Moody, 649 F.2d 124 (2d Cir. 1981); United States v. Dawson, 642 F.2d 1060 (7th Cir. 1981); United States v. Barnes, 604 F.2d 121 (2d Cir. 1979).

[6]645 F.2d 115 (2d Cir. 1981).

[7]*Id.* at 116.

[8]Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(4).

The Advocate
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1984 Guilty Plea Checklist

Introduction

The Guilty Plea Checklist (GPC) is divided into several topics, each containing appropriate cases through Volume 17 of the Military Justice Reporter (M.J.) and is cross-referenced to the Manual for Courts-Martial, United States, 1969 (rev. ed.) (MCM), the Rules for Courts-Martial of the Manual for Courts-Martial, United States, 1984 (RCM), the Uniform Code of Military Justice (UCMJ), and the West Military Justice Key Numbers (#) (the Key Number System is copyrighted by the West Publishing Co. and Key Numbers are reprinted in the GPC with the permission of West Publishing Co.).

The GPC will be published in its entirety in two issues of *The Army Lawyer*. Topics A through F appear in this issue; Topics G through U will appear in the April 1985 issue.

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   (a) MCM, para. 5; UCMJ arts. 23, 24, 25.
   (b) Key #84, 85.
   RCM 504(b) provides who may convene courts-martial (and thus is the proper CA); the power to convene courts-martial may not be delegated. This supersedes GPC 1983 F.1. *Cases*, 6 M.J. 950 (A.C.M.R. 1979); *Greenwell*, 42 C.M.R. 62 (C.M.A. 1970); *Ortiz*, 36 C.M.R. 3 (C.M.A. 1965).
   (1) *Tatty*, 17 M.J. 1127 (N.M.C.M.R. 1984) (failure to process charges within accused's chain of command did not constitute jurisdictional defect).
   (2) *Blascak*, 17 M.J. 1081 (A.F.C.M.R. 1984) (court was properly convened where typographical error on charge sheet was inconsequential).
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   (b) Key #84, 85, 86.
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(b) Key #85, 86.
(1) *Holmes*, 17 M.J. 611 (N.M.C.M.R. 1983) (where oral modification was made to the convening order at trial without defense objection, court-martial had jurisdiction).
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5. Was accused under age 17 at the time of trial?
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6. Was accused held for trial after expiration of his enlistment?
(a) MCM, para. 11*d*. RMC 202(a)(2)(B)(i) provides that service members may be retained past their scheduled time of separation, over protest, by action with a view to trial while they are still subject to the Code.
(b) Key #7.
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(3) *Jones*, 15 M.J. 890 (A.C.M.R. 1983) (officer who convened the court had power to convene accused's court-martial even though accused received reassignment order prior to his commission of the offenses).
(4) *Fitzpatrick*, 14 M.J. 394 (C.M.A. 1983, and *Douse*, 12 M.J. 473 (C.M.A. 1982) court-martial jurisdiction over a service member continues until his military status is terminated by separation, even when there has been unwarranted delay in separating him and he has actively requested to be separated).

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Guard and Army Reserve, 12 Advocate 2 (1980).
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(2) *Self*, 8 M.J. 519 (A.C.M.R. 1979) (National Guardsman remained subject to military criminal jurisdiction where his retention on active duty was authorized by state officials who extended period of active duty until court-martial proceedings were completed).
(3) *Peel*, 4 M.J. 28 (C.M.A. 1977) (retention of National Guardsman on active duty beyond training period is sought from state authorities).

8. Were the charges withdrawn and re-referred?
(a) MCM, para. 56*a, b, c, d.* MCM, para. 56 uses "good cause" language as a ground for withdrawal while RCM 604(b) provides that charges may be withdrawn and referred unless the withdrawal was for an "improper reason." *See Walsh*, 47 C.M.R. 926 (C.M.A. 1973) (wrongful withdrawal and referral is prejudicial error). *See also Williams*, 29 C.M.R. 275, C.C.M.A. 1960); *Benitez*, 38 C.M.R. 607 (A.B.R. 1967) (arbitrary and unfair withdrawal of the charge from a special court and referral to a general court was highly prejudicial to the accused).
(b) RCM 604(b) provides that before arraignment, withdrawal due to receipt of additional charges will not preclude another referral; this supersedes *Jackson*, 1 M.J. 242 (C.M.A. 1976). The reasons for the withdrawal and later referral of the charges should be in the record of the later court-martial if the latter referral is more onerous to the accused: this supersedes *Hardy*, 4 M.J. 20 (C.M.A. 1977).
(c) Key #130, 280.
(1) *Fields*, 17 M.J. 1070 (A.F.C.M.R. 1984) (although charges against accused were not properly referred, this did not constitute a jurisdictional defect).
(2) *Malich*, 17 M.J. 707 (N.M.C.M.R. 1983) (no error was committed when the government, with the accused's consent, referred an additional charge and specification to trial to accommodate exigencies of proof).
(3) *Satterfield v. Drew*, 17 M.J. 269 (C.M.A. 1984) (further proceedings after withdrawal of charge, which was not followed by re-referral of the charge, constituted judicial usurpation of power; accused was entitled to extraordinary relief).
(4) *Blaylock*, 15 M.J. 190 (C.M.A. 1983) (officer exercising GCM jurisdiction may cause withdrawal of the charges and re-referral to a different level of CM).
(5) *Meckler*, 6 M.J. 779 (A.C.M.R. 1978) (failure to state reasons for withdrawal and re-referral of case to a different panel did not cvause the CM to lack jurisdiction).
(6) *Shepardson*, 17 M.J. 793 (A.F.C.M.R. 1983) (when case is withdrawn with view toward prosecution at later date, detailed statement of reasons for the withdrawal is required to be included in or attached to the record of the earlier proceeding).
(7) *Shrader*, 50 C.M.R. 767 (A.F.C.M.R. 1975) ("good cause" requires very serious and weighty reasons to justify withdrawal after arraignment).

9. (a)Was less than a quorum detailed or present at any meeting requiring the presence of court members?
(b) If trial with EM, were less than ⅓ of the members EM at anytime during the trial?
See Assembly of the Court, Section J.

10. Does the record show that after each session, adjournment, recess, or closing during the trial, the parties to the trial were accounted for when the court reopened?
MCM, para. 61*c, h.* RCM 813(b) provides that the military judge shall insure that the record reflects whether all parties and members who were present at the time of the adjournment or recess, or at the time the court-martial closed, are present. *See Greenwell*, 31 C.M.R. 146 (C.M.A. 1961) (when court member is absent after arraignment, record must show reasons; failure constitutes prejudicial error, and requires a rehearing).

11. If the military judge or any member present at assembly was thereafter absent, was such absence the result of challenge, physical disability, or order of the convening authority based on good cause? Was this shown in the record of trial?
(a) MCM, para. 37*a, b.* RCM 505(de)(2) provides that after a court-martial is assembled, the military judge may be changed only for good cause shown, which includes physical disability, military exigency, and other extraordi-

nary circumstances. *See Boysen*, 29 C.M.R. 147 (C.M.A. 1960). RCM 505(e)(1) provides that before a court-martial is assembled, the military judge may be changed by authority competent to detail the military judge, without cause shown on the record; this supersedes *Smith*, 3 M.J. 490 (C.M.A. 1975).

(b) Key #82, 85, 86, 280.
RCM 505(c)(2)(A)(i) provides that after assembly no member may be excused except by the convening authority for good cause shown on the record; this supersedes *Garcia*, 15 M.J. 864 (A.C.M.R. 1983).

12. Were new members appointed after arraignment?
(a) MCM para. 37*b*. RCM 505(c)(2)(B) provides that new members may be detailed after assembly in certain situations. This supersedes *Ellison*, 13 M.J. 90 (C.M.A. 1982); *Peebles*, 2 M.J. 404 (A.C.M.R. 1975).
(b) Key #225.

13. Did any court member, the MJ, counsel for either side, the investigating officer, or the SJA serve in any other capacity related to the trial; for example, as the accuser or a witness for the prosecution? If any of the above, did appellant waive such disqualification?
(a) Key #86.
(1) *Garwood*, 16 M.J. 863 (N.M.C.M.R. 1983) (trial judge erred in engaging in number of press interviews during preliminary proceedings but judicial misconduct did not require recusal of trial judge).
(2) *Rice*, 16 M.J. 770 (A.C.M.R. 1983) (MJ who had not been detailed as trial judge but who was aware that he was "normally" judge in all general courts-martial tried in that jurisdiction, was under greater duty to proceed cautiously).
(3) *Montgomery*, 16 M.J. 516 (A.C.M.R. 1983) (judge's disclaimer of bias is given great weight; since trial defense counsel did not challenge military judge for cause, military judge's failure to *sua sponte* recuse himself was not error.)
(4) *Jones*, 15 M.J. 967 (A.C.M.R. 1983) (accused is entitled to trial in which military judge has fair and open mind).
(5) *Watson*, 15 M.J. 784 (A.C.M.R. 1983) (attempt to avoid consequences of expected adverse decision is not proper basis for challenge to judge).
(6) *Petersen*, 15 M.J. 530 (A.F.C.M.R. 1982) (military judge is not subject to challenge for merely presiding over closely related case).
(7) *Conley*, 4 M.J. 327 (C.M.A. 1978) (MJ who relied on his own expertise as a documents examiner had to be considered as a prosecution witness and was thus disqualified).
(b) Key #91, 93.
Miller, 3 M.J. 326 (C.M.A. 1977) (mere presence of disqualified member on court was not jurisdictional defect; defect is cured by challenging and removing such member and detailing additional members if necessary to obtain quorum)
(c) Key #221; MCM, para. 62*f*(6), 63; RCM 912(f).
RCM 912(f)(1)(D) provides that a member shall be excused for cause whenever it appears that the member will be a witness in the court-martial; this supersedes *Aaron*, 1 M.J. 1052 (N.C.M.R. 1976); *Wilson*, 23 C.M.R. 120 (C.M.A. 1957).
RCM 912(f)(1)(E) provides that a member shall be excused for cause whenever it appears that member has acted as counsel for any party as to any offense charged; this supersedes *Hurt*, 24 C.M.R. 34 (C.M.A. 1957).
(d) Key #231.
Catt, 1 M.J. 41 (C.M.A. 1975) (DC who wrote pretrial advice was not disqualified where the accused was aware of his participation in advice but specifically requested him as counsel).
(e) Key #229.
(1) *Blanchette*, 17 M.J. 512 (A.F.C.M.R. 1983) (assistant trial counsel, acting as recorder in related administrative discharge board, is not disqualified in absence of bias, hostility, or personal interest).
(2) *Payne*, 3 M.J. 354 (C.M.A. 1977) (TC cannot assume function of assistant to investigating officer).

14. Was accused tried *in absentia*?
(a) MCM, para. 11*c*. RCM 804(b)(1) provides that further progress of the trial shall not be prevented and accused shall be considered to have waived right to be present whenever an accused, initially present, is voluntarily absent after arraignment (whether or not informed by the military judge of the obligation to remain during the trial); supersedes *Bystrzycki*, 8 M.J. 540 (N.C.M.R. 1979).
(b) *Key* #225.
(1) *Aldridge*, 16 M.J. 1008 (A.C.M.R. 1983) (surrender of accused to military authori-

ties following his voluntary and unauthorized departure from trial site, after knowing trial date, did not change his absence from voluntary to involuntary).

(2) *Pebbles*, 3 M.J. 177 (C.M.A. 1977) (after arraignment, accused was not notified of trial date; absence was not voluntary so as to invoke waiver of right to be present at trial).

(c) Key #242, 331.
Minter, 8 M.J. 867 (N.C.M.R. 1980) (MJ committed prejudicial error by instructing the court members that he had determined that the accused's absence was unauthorized).

\2. Subject Matter Jurisdiction:

1. Does subject matter jurisdiction exist?

(a) RCM 203(c)(1) discusses *Relford*, 401 U.S. 355 (1971). RCM 203(a) discusses *O'Callahan*, 395 U.S. 258 (1969). RCM 203(c) discusses *Schlesinger*, 420 U.S. 738 (1975).
Key #50.

(1) *Mauck*, 17 M.J. 1033 (A.C.M.R. 1984) (offenses committed at geographical boundary of military post had significant effect on enclave so as to establish court-martial jurisdiction).

(2) *Johnson*, 17 M.J. 73 (C.M.A. 1983) (unauthorized absence during commission of crime prohibited by UCMJ is a factor in establishing service-connection).

(3) *Hollis*, 16 M.J. 954 (A.F.C.M.R. 1983) (dismissal for lack of subject-matter jurisdiction in trial of other serviceman did not benefit accused because doctine of *res judicata* was inapplicable).

(4) *Campbell*, 16 M.J. 886 (A.F.C.M.R. 1983) (potential discrediting of the service is proper consideration when assessing service connection).

(5) *Harens*, 16 M.J. 553 (A.F.C.M.R. 1983) (service member is not subject to court-martial unless offense is service connected).

(6) *Swavely*, 15 M.J. 696 (A.C.M.R. 1983) (offense must have sufficient military service connection to warrant disposition by military judicial system rather than civilian).

(7) *Matthews*, 15 M.J. 622 (N.M.C.M.R. 1982) (military did not have subject-matter jurisdiction where victim of money order theft, thieves, and sellers did not have military connection and accused purchased the stolen money orders outside military jurisdiction).

(8) *Lockwood*, 15 M.J. 1 (C.M.A. 1983) (use of military identification card near military base injuring reputation, morale, and integrity of base constituted sufficient service connection).

(b) Key #50.
RCM 203(d)(1) provides that offenses which are committed outside the territorial limits of the United States and its possessions and which are not subject to trial in the civilian courts of the United States need not be service-connected to be tried by court-martial; this supersedes *Adams*, 13 M.J. 728 (A.C.M.R. 1982).

(c) Key #60.
RCM 203(b)(4) provides that almost every involvement of service personnel with the commerce in drugs, including use, possession, and distribution is service-connected, regardless of location; this supersedes *Trottier*, 9 M.J. 337 (C.M.A. 1980). *See* Schutz, *Trottier and the War against Drugs: An Update*, The Army Lawyer, Feb. 1983, at 20.
Petitti, 14 M.J. 754 (A.C.M.R. 1982) (off-post threat made to confidential informant by accused was linked to commerce in drugs, had substantial impact upon military discipline, and was sufficiently connected with service to confer jurisdiction on court-martial).

(1) *White*, 17 M.J. 1119 (N.M.C.M.R. 1984) (drug use, close in time to return to military control, established service connection).

(2) *Caputo*, 17 M.J. 921 (N.M.C.M.R. 1984) (possession of significant quantities of illegal drugs for distribution by active duty service members and those in a training status is service connected).

(3) *Mika*, 17 M.J. 812 (A.C.M.R. 1984) (appellant's immunity from prosecution under the Alcohol and Drug Abuse Prevention and Control Program was not jurisdictional issue and was thus waived by his subsequent plea of guilty).

(4) *Campbell*, 16 M.J. 886 (A.F.C.M.R. 1983) (serviuce connection of drug offenses is readily evident).

(5) *Harens*, 16 M.J. 553 (A.F.C.M.R. 1983) (when all but one of interwoven drug offenses are clearly service-connected, this offense is likewise subject to trial by court-martial).

(6) *Murray*, 16 M.J. 74 (C.M.A. 1983) (use of psychoactive drug by service member on extended leave far away from any

military installation is service-connected if he later enters military installation subject to effects of the drug).

(7) *Hairston*, 15 M.J. 892 (A.C.M.R. 1983) (purchaser's military status and situs of the offenses near a military post were sufficient to confer jurisdiction).

(8) *Snavely*, 15 M.J. 696 (A.C.M.R. 1983) (military had jurisdiction where accused made two off-base marijuana sales to person to whom he had made initial sale on base and accused's drug business headquarters was on base).

(9) *Newak*, 15 M.J. 541 (A.F.C.M.R. 1982) (Miller, J., concurring) (discussion of military versus civilian jurisdiction).

(d) Key #121, 122, 133, 151; MCM, paras. 67*b*, 69*b*. RCM 203(b) provides that the prosecution should plead the facts establishing jurisdiction; if the issue is raised, the prosecution must prove the disputed facts necessary to establish jurisdiction over the offense. RCM 905(e) provides that the failure to object to lack of jurisdiction before the court-martial is finally adjourned does not constitute waiver; this supersedes *Alef*, 3 M.J. 414 (C.M.A. 1977); *Adams*, 13 M.J. 728 (A.C.M.R. 1982); *George*, 14 M.J. 990 (N.C.M.R. 1982). *See* Cooper, Turning Over a New Alef: A Modest Proposal, The Army Lawyer, Mar. 1982, at 8. *Fields*, 17 M.J. 1070 (A.F.C.M.R. 1984) (accused waived any jurisdictional defect by failing to raise objections based on defects in referral of the case; waiver would not have been invoked had he alleged improper command control).

A3. *In Personam* Jurisdiction:

1. Does *in personam* jurisdiction exist?

(a) Key #5.

(1) *Long*, 17 M.J. 661 (N.M.C.M.R. 1983) (retroactive application of 1979 amendments to Article 2 may occur if offense does not depend upon accused's military status; courts-martial had in personam jurisdiction). *See also, Andrews*, 17 M.J. 717 (N.M.C.M.R. 1983).

(2) *McDonagh*, 14 M.J. 415 (C.M.A. 1982) (amendments to UCMJ art. 2 concerning validity of enlistment for purposes of jurisdiction were intended to be fully retroactive).

(b) Key #6, 7.
RCM 202(a)(2)(B)(iii)(b)(3) provides that person who was subject to the Code at the time offense was committed is subject to trial by court-martial despite a later discharge if the reenlistment occurred after 26 July 1982. This supersedes *Clardy*, 13 M.J. 308 (C.M.A. 1982); *Horton*, 14 M.J. 96 (C.M.A. 1982).
Imler, 17 M.J. 1021 (N.M.C.M.R. 1984) (demand for discharge prior to enlistment expiration did not operate to divest court-martial of jurisdiction).

(c) Key #7.
Mosley, 14 M.J. 852 (A.C.M.R. 1982) (discussion of application of Art. 3(a) to statute with extraterritorial application).

2. Did a competent authority refer each charge to the court-martial? RCM 201(b)(3) provides that each charge before the court-martial must be referred to it by competent authority.

3. After arraignment, were additional charges referred to the same trial?
RCM 601(e)(2) provides that after arraignment, additional charges may be referred to the same trial only with the accused's consent.

Topic B—Trial Procedure

1. Does the record show place, date, and hour of each Article 39(a) session, the assembly and each opening and closing of the court thereafter?
(a) MCM 53*d*(3). RCM 803 provides that these sessions shall be made part of the record.

2. Were the members of the court, MJ, personnel of the prosecution and defense, reporter and interpreter (if any) sworn or previously sworn? Reporter not accuser?
Key #319, 324; MCM 49*b*(3), 50*b*, 61*d*, 112, 113, 114. RCM 807 provides who must be sworn and the procedure. RCM 901(c) provides for the swearing of interpreters and reporters.
Stafford, 15 M.J. 866 (A.C.M.R. 1983) (Key #319: in absence of any evidence that reporter had not been sworn, court would presume regularity; Key #324: even if reporter was not sworn, no reversal unless prejudice shown).

3. Were the MJ, TC, and DC properly certified?
Key #86.
RCM 502(c) states that the MJ must be certified. RCM 502(d) sets forth qualifications for counsel.
Ware, 5 M.J. 24 (C.M.A. 1978) (where MJ on convening order was replaced by oral modification, CM lacked jurisdiction to proceed absent properly signed modification).

4. Was a properly certified DC or CDC present during all open session of the court?
MCM 6*b*. RCM 805(c) discusses the presence of counsel.

5. For additional matters of trial procedure, *see generally*, the related key number topic.

Topic C—Right to Counsel

1. Was the appellant properly advised of the rights to DC, IDC, and CDC?
   MCM 48*a*; RCM 506, 901(d)(4).
   (a) MCM 48*a*. RCM 506 provides for the accused's right to counsel. RCM 901(d)(4)(A) provides for the MJ to inform the accused of his rights.
   (b) Key #111.
   Jorge, 1 M.J. 184 (C.M.A. 1975) (in addition to informing accused, on the record, of his right to be represented by IDC, MJ must inform him of the right to be represented by CDC).
   (c) Key #231.
   (1) *Alban*, 17 M.J. 1002 (N.M.C.M.R. 1984) (MJ erred in advising accused that he would have to choose between military counsel and his retained CDC, but not prejudicial under the circumstances).
   (2) *Bowie*, 17 M.J. 821 (A.C.M.R. 1984) (MJ encouraged but not required to inform accused of his right to represent himself).
   (3) *Gnibus*, 16 M.J. 844 (N.M.C.M.R. 1983) (after attorney-client relationship between accused and DC was served, MJ did not err, under the circumstances, in denying request for original DC as new DC or IDC).
   (4) *Kelly*, 16 M.J. 244 (C.M.A. 1983) ([1] CA need not consider accused's preferences in detailing DC; [2] once accused requests new DC and prior DC attorney-client relationship is severed, CA is not required to re-detail prior DC to accused's case).
   (5) *Wallace*, 14 M.J. 1019 (A.C.M.R. 1982) (burden is on defense to show MJ's denial of request for IDC was incorrect.)
   (6) *West*, 13 M.J. 800 (A.C.M.R. 1982) (MJ's duty is not to make determination of availability of requested IDC but to review command decision to determine if it was based on reasonable considerations).
   (7) *Ettelson*, 13 M.J. 348 (C.M.A. 1982) (CMA must broadly apply statutory right to IDC; but in this case there were sound reasons for denial).
   (8) *Fellows*, 5 M.J. 674 (A.C.M.R. 1978) (even where accused has CDC, MJ must inform him of right to IDC; failure to do so requires reversal).
   (9) *Copes*, 1 M.J. 182 (C.M.A. 1975) (MJ must inform accused that IDC right extends to *any* military counsel who is reasonably available.
2. Was the accused denied a continuance to retain civilian/military counsel?
   (a) MCM 48*b*; RCM 906(b)(1), (2) discuss continuances.
   (b) Key #214.
   (1) *Bowie*, 17 M.J. 821 (A.C.M.R. 1984) (after accused received seven-week continuance to obtain CDC, MJ did not abuse discretion by denying another continuance to obtain CDC).
   (2) *Lambert*, 17 M.J. 773 (A.F.C.M.R. 1983) (MJ did not abuse discretion under the circumstances by denying late request by accused for unavailable IDC).
   (3) *Perry*, 14 M.J. 856 (A.C.M.R. 1982) (under the circumstances MJ did not abuse discretion by denying continuance where accused made late request for IDC over 100 miles away and with whom the accused had no established attorney-client relationship).
   (4) *Kinard*, 45 C.M.R. 74 (C.M.A. 1972) (extremely unusual circumstances must exist for accused to be forced to forego CDC and go to trial with assigned DC rejected by him; but no abuse of discretion under the circumstances of this case).
   (c) Key #231.
   Radford, 14 M.J. 322 (C.M.A. 1982) (where DC requested withdrawal after accused presented testimony which DC believed false, MJ erred by failing to inquire whether accused wanted new counsel).
3. Was there multiple representation of co-accused/witness by the same counsel?
   Key #151, 232, 319.
   (a) *Breese*, 11 M.J. 17 (C.M.A. 1981) (where MJ is aware of multiple representation, rebuttable presumption of error exists if he does not conduct suitable inquiry re conflict of interest; but in this case there was no actual or apparent conflict). *See also Devitt*, 17 M.J. 905 (A.F.C.M.R. 1984) where court reversed.
   (b) *Jeancoq*, 10 M.J. 713 (A.C.M.R. 1981) (MJ did not err by not inquiring about conflict of interest where MJ was not informed by any party to trial of potential conflict). *See Dunavent*, 11 M.J. 69 (C.M.A. 1981); *Russaw*, 15 M.J. 801 (A.C.M.R. 1983).
   (c) *Testman*, 7 M.J. 525 (A.C.M.R. 1979) (where DC negotiated PTA for three accuseds, MJ erred in frailing to inform accused of right to

separate, completely loyal counsel, even when no actual prejudice was established).

(d) *Davis*, 3 M.J. 430 (C.M.A. 1977) (when a conflict appears to exist, MJ must inform the accused so he may decide whether to continue with present counsel or new counsel).

Topic D—Choice of Trial Forum

1. If trial is by MJ alone, was the request in writing?
   (a) MCM 4*a*, 53*d*(2), 61*g*. RCM 903(b)(2) provides that the request shall be in writing.
   (b) Key #83.
      (1) *Calhoun*, 14 M.J. 588 (N.M.C.M.R. 1982) (where the accused admitted he made MJ alone request and claimed his signature was on it, he adopted as his signature the hand-printed representation of his name found there).
      (2) *Butler*, 14 M.J. 72 (C.M.A. 1982) (MJ is required to make the basis of his denial of request for trial by MJ alone a matter of record; failure to do so required reversal).
      (3) *Dean*, 43 C.M.R. 52 (C.M.A. 1971) (without a request in writing, court composed of MJ alone is not lawfully constituted as a court; reversal required).
   (c) Key #86.
      Reeves, 12 M.J. 763 (A.C.M.R. 1981) (serving as military magistrate for PC does not automatically render MJ ineligible to serve as MJ in same case).
2. Did appellant know the identity of MJ when request was prepared?
   (a) No waiver. Key #83; MCM 4*a*, 53*d*(2). RCM 903(c)(2)(A) provides that the MJ shall ascertain whether the accused has been informed of the MJ's identity.
   (b) *Stearman*, 7 M.J. 13 (C.M.A. 1979) (absence of MJ's name on written request for trial by judge alone is not fatal to jurisdiction if the record indicates that the accused knew the MJ's identity).
3. Did MJ advise appellant of his right to trial by court members and voting procedures?
   RCM 903(c)(2)(A) provides that MJ should advise accused of right to trial by members.
4. Did MJ advise enlisted appellant of his right to court with 1/3 EM?
   May be waived. Key #81, 83; MCM 61*h*, Art. 25(c)(1), UCMJ. RCM 903(a)(1) provides that MJ shall ascertain whether the accused elects to be tried by a court with EM.
   (a) *Beard*, 7 M.J. 452 (C.M.A. 1979) (where defense counsel told MJ that accused knew of right to have EM panel, no error for MJ not to ask accused if he wanted EM panel).
   (b) *Stegall*, 6 M.J. 176 (C.M.A. 1979) (where MJ explained difference between jury and judge alolne trial, but did not mention 1/3 EM right, court found no error because MJ alone request was made knowingly and understandingly).
5. If trial with EM, was it requested in writing?
   No waiver. Key #81; MCM 61*g*; Art. 25(c)(1), UCMJ. RCM 503(a)(2) provides that an enlisted accused may request EM as members. RCM 903(b)(1) provides that EM request shall be in writing and signed by accused.
   (a) *Shoemake*, 17 M.J. 858 (N.M.C.M.R. 1984) (where defense counsel makes written EM request and accused knew of it and made oral request at trial, accused adopted counsel's signature as his own EM request).
   (b) *Robertson*, 7 M.J. 507 (A.C.M.R. 1979) (EM may be appointed to court-martial before written EM request but may not serve without written request).
   (c) *Williams*, 50 C.M.R. 219 (A.C.M.R. 1975) (proper written EM request from first trial which resulted in mistrial, may be orally reaffirmed if never withdrawn by accused's counsel at second trial).
   (d) *White*, 21 C.M.A. 583, 45 C.M.R. 357 (1972) (accused's written request for EM is jurisdictional prerequisite to trial by court with enlisted members).
6. Did any enlisted court member belong to same unit as accused?
   May be waived. MCM 4*b*; UCMJ art. 25(c)(1). RCM 912(f)(1)(B)(f)(4) provides that the membership of EM in the same unit as accused may be waived).

Topic E—Charges and Arraignment

1. Was accused tried, over objection, upon unsworn charges?
   (a) May be waived. MCM 29*e*, 112*b*; UCMJ art. 30.
   (b) Key #120, 153.
      RCM 307(b) provides that the charges and specifications be signed under oath before a commissioned officer.
      (1) *Logan*, 13 M.J. 821 (A.C.M.R. 1982) (even if amendments were so substantial as to require that charges be resworn, accused's subsequent guilty pleas waived defect).

(2) *Autrey*,12 M.J. 547 (A.C.M.R. 1981) (accused may not be tried on unsworn charges over objection; deviation from manual procedure for administering oaths not fatal; substantial compliance sufficed).
(3) *Koepke*, 36 C.M.R. 40 (C.M.A. 1965) (accused may not be tried upon unsworn charges over his objection).

2. Do specifications demonstrate jurisdictional basis for trial and offenses?
   (a) MCM 28*a*(a), 67*b*. RCM 307(c)(3) discussion provides that the specification must state the jurisdictional basis.
   (b) Key #121.
   Alef, 3 M.J. 414 (C.M.A. 1977) (government must affirmatively demonstrate jurisdictional basis through charges).
   (c) Key #133.
   King, 6 M.J. 553 (A.C.M.R. 1978) (form of specification is not jurisdictional and is waived by failure to object). *See also Fields*, 17 M.J. 1070 (A.F.C.M.R. 1984).
3. Does each specification allege or resonably imply every essential element of the offense (compare with forms in app. 6*c*, MCM)?
   Key #121, 122; MCM 28*a*(3). RCM 307(c)(3) provides that the specification must expressly or by implication state every element of the charged offense.
   (a) *Hoskins*, 17 M.J. 134 (C.M.C. 1984) (specification which does not allege every essential element is not fatally defective if element is included by clear implication; burglary specification defective because did not put "break and" before "enter"); *Norman*, 16 M.J. 937 (A.C.M.R. 1983) (burglary specification not defective because omitted word "dwelling"); *Green*, 7 M.J. 966 (A.C.M.R. 1979) (burglary specification not defective because did not specify room was "of another").
   (b) *Krebs*, 43 C.M.R. 327 (C.M.A. 1971) (specification in general terms was legally sufficient where DC indicated he understood the nature of the stolen property, and the particular articles were described in the record).
   (c) Specific examples:
   (1) *Garrett*, 17 M.J. 907 (A.F.C.M.R. 1984) (adultery specification alleging that accused had sexual relation with "woman not his wife" was insufficient because did not include that one party was married to a third party).
   (2) *Chandler*, 17 M.J. 571 (A.F.C.M.R. 1983) (forgery specification was insufficient because it did not indicate how instrument would operate to legal prejudice of another).
   (3) *Locke*, 16 M.J. 763 (A.C.M.R. 1983) (assault with dangerous weapon specification was insufficient because it did not allege that assault was with dangerous weapon).
   (4) *Kinard*, 15 M.J. 1052 (N.M.C.M.R. 1983) (larceny specification was sufficient where ownership was obvious by implication).
   (5) *Schiavo*, 14 M.J. 649 (A.C.M.R. 1982) (willfully damaging military property specification was insufficient because it did not allege object was military property).
   (6) *Eckert*, 8 M.J. 835 (A.C.M.R. 1980) (graft specification must allege accused's specific position or duty).
   (7) *Showers*, 45 C.M.R. 647 (A.C.M.R. 1972) (failure to allege "wrongfully" in attempted drug specification was fatal); likewise, *Brice*, 38 C.M.R. 134 (C.M.A. 1967).
4. & 5. Were all specifications referred to trial by CA? Was accused arraigned on charges that had been previously withdrawn?
   Key #130, 150; MCM 33*h*, 92*a*. RCM Chapter VI covers referral, service, amendment and withdrawal of charges.
   (a) *Satterfield v. Drew*, 17 M.J. 269 (C.M.A. 1984) (trial counsel may have implied authority to withdraw a charge without prejudice, but further proceedings after withdrawal of charge, which was not followed by rereferal of the charge, constituted judicial usurpation of power and accused was entitled to extraordinary relief).
   (b) *Cook*, 12 M.J. 448 (C.M.A. 1982) (withdrawal of charge before trial in return for guilty plea is for good cause and does not prevent renewal of charge after plea found improvident unless reprosecution is unfair or there is prosecutorial vindictiveness).
   (c) *Motes*, 40 C.M.R. 876 (A.C.M.R. 1969) (conviction on specifications withdrawn by CA prior to arraignment set aside).
6. Motions.
   (a) Did MJ defer rulings on motions *in limine*?
   Key #110,220; MCM 67*e*. RCM 905(d) provides that determination of a motion may be deferred for good cause.

(1) *Wright*, 13 M.J. 824 (A.C.M.R. 1982) (MJ has considerable latitude to establish rules for timing and presentation of motions. Accused generally entitled to ruling on motion on issue of whether prior conviction may be used to impeach, but waived unless timely, specific objection with offer of proof).

(2) *Cofield*, 11 M.J. 422 (C.M.A. 1981) (MJ has considerable discretion in whether to defer rulings on motions in limine).

(b) Was accused curtailed in making motions?
Key #151.
Bethke, 13 M.J. 71 (C.M.A. 1982) (where MJ implied accused would lost PTA if litigated pre-plea motions, error required limited rehearing on merits of motions before review court would assess prejudice).

(c) Are any offenses duplicitous?
Key #133.
RCM 906(b)(5) discussed severance of a duplicitous specification into two or more specifications.
Parker, 3 C.M.A. 541, 13 C.M.R. 97 (1953) (failure to object to duplicitous specification constitutes waiver). *See also Dejonge*, 16 M.J. 974 (A.F.C.M.R. 1983).

(d) Are any offenses multiplicious?
Multiplicity is a complex, fast-changing topic and outside the scope of the 1984 GPC.

7. Any evidence, charges/trial result of prosecutorial vindictiveness?
Key #63, 161.
(a) *Williams*, 12 M.J. 1038 (A.C.M.R. 1982) (command's desire to eliminate accused from service because of his prolonged absence did not have appearance of vindictiveness).
(b) *Bass*, 11 M.J. 545 (A.C.M.R. 1981) (accused must demonstrate that government official acted vindictively; government may rebut but good faith alone is insufficient).

8. Did amendments to specifications occur?
Key #124; MCM 33*d*. RCM 603(d) discusses changes and amendments.
(a) *Garrett*, 17 M.J. 907 (A.F.C.M.R. 1984) (where defense objects to amendment of charge not alleging offense which converts it into one which does, charge must be resworn).
(b) *Logan*, 13 M.J. 821 (A.C.M.R. 1982) (accused's subsequent guilty pleas to amended specifications waived defect even if amendments were so substantial as to require that charges be resworn).

Topic F—Providence Inquiry

See Moriarty, *The Providence Inquiry: A Guilty Plea Gauntlet?*, 13 Advocate 333 (1981); Lukjanowicz, *The Providence Inquiry: An Examination of Judicial Responsibilities*, 13 Advocate 333 (1981).

1. Were any motions made before the plea?
Key #142; MCM 67*a*; RCM 905(b) provide for motions to be raised before entry of plea. Enumerated motions not involving jurisdictional defects are waived if not raised. *Regan*, 11 M.J. 745 (A.C.M.R. 1981) (where specification did not state an offense, plea of guilty to that offense was improvident; in that case certain conduct did not amount to an offense under UCMJ art. 134).

2. Did MJ conduct adequate *Care* inquiry?
Key #141; MCM 70*b*; RCM 910 govern pleas and inquiry. *Care*, 18 C.M.R. 535, 40 C.M.R. 247 (1969). This case is the cornerstone of plea inquiries. It provides:
MJ must explain elements of each offense charged;
MJ must question accused about what he did or did not do;
If pertinent, MJ must question accused about his intent, to make clear basis for determining guilt;
This is not satisfied by merely questioning whether accused realizes plea admits every element charged and acts or omissions alleged and authorizes convictions without further proof;
Counsel should also explain the elements and determine the factual basis, but this does not relieve MJ from doing so;
MJ must also personally address accused and advise him his pleas waive rights against self-incrimination, to trial of facts by a court-martial and to confront witnesses; and
MJ must make a finding that there was a knowing, intelligent, and conscious waiver of rights by the accused to accept plea.

3. Did the MJ explain that the plea waived specific constitutional rights and motions to suppress?
(a) RCM 910(c)(3) and (4) provide that by pleading guilty accused waives certain rights.
(b) Key #142.
Peters, 11 M.J. 875 (N.M.C.M.R. 1981) (guilty plea improvident where accused pled guilty on assurances that unlawful search and defective chain of custody issues raised at trial would be preserved for appellate review).
(c) Key #152.
(1) *Bethke*, 13 M.J. 71 (C.M.A. 1982) (where accused withdrew motions after MJ im-

plied his PTA would be threatened, case was returned for limited hearing on merits of motions only).

(2) *Jackson*, 7 M.J. 647 (A.C.M.R. 1979) (otherwise provident plea was not rendered improvident where MJ did not discuss waiver of denial of motion to suppress with DC or accused).

(3) *Williams*, 41 C.M.R. 426 (A.C.M.R. 1969) (suppression motion not waived by guilty plea where law officer so advised accused).

(d) Key #153.

(1) *Shores*, 16 M.J. 546 (A.C.M.R. 1983) (where accused proposed irregular plea, error in accepting the irregular plea was waived).

(2) *Cowles*, 16 M.J. 467 (C.M.A. 1983) (although guilty plea waived privilege against self-incrimination as to guilt, this did not extend to requiring accused during presentencing to answer questions about NJP record government wished to introduce).

(3) *Mallett*, 14 M.J. 631 (A.C.M.R. 1982) (MJ correctly advised accused that provident guilty plea would waive any right to appellate review of search and seizure issue, despite attempt in PTA to preserve the issue).

(4) *Higa*, 12 M.J. 1008 (A.C.M.R. 1982) (where MJ incorrectly advised accused that he preserved his objections regarding lawfulness of search and voluntariness of statements in spite of guilty plea, plea was improvident).

4. Did inquiry include explanation of each element of offense?

Key #151, 152; MCM 70*b*(2). RCM 910(c)(1), (e) require the MJ to explain offense elements to accused.

(a) *Wheaton*, 15 M.J. 941 (N.M.C.M.R. 1983) (although MJ's explanation of elements of offense was not model under MCM 70*b*, he did detail the elements in the progression of questions posed).

(b) *Luby*, 14 M.J. 619 (A.F.C.M.R. 1982) (where MJ explained elements of conspiracy, failure to immediately instruct on elements of substantive offense was not fatal when he did so later; guilt was clear and inquiry was thorough).

(c) *Pretlow*, 13 M.J. 85 (C.M.A. 1982) (*Care* should be strictly interpreted; guilty plea to conspiracy was improvident where MJ failed to explain elements of complex underlying substantive offense).

(d) *Footman*, 13 M.J. 827 (A.C.M.R. 1982) (totality of proceedings indicated that MJ complied with *Care* in explaining offense elements).

(e) *De Los Santos*, 7 M.J. 519 (A.C.M.R. 1979) (MJ need not delineate elements separately so long as his advice to and questioning of accused indicate what elements are).

(f) *Williams*, 6 M.J. 611 (A.C.M.R. 1978) (where MJ failed to explain elements of substantive offense and elicit essential facts, plea was improvident).

5. Did the MJ make specific inquiry into factual predicate supporting the plea?

(a) RCM 910(e) provides that the MJ should be satisfied of the factual basis for the plea.

(b) Key #147.

(1) *Kellner*, 16 M.J. 524 (A.C.M.R. 1983) (although MJ called offense by wrong name, where he clearly expressed the elements and accused judicially confessed to each element, there was definite factual basis for guilty plea).

(2) *Sheehan*, 15 M.J. 724 (A.C.M.R. 1983) (where factual predicate of intentional deception was established, plea was not improvident where MJ failed to define "conduct unbecoming an officer and a gentleman").

(3) *Buske*, 2 M.J. 465 (A.C.M.R. 1975) (where MJ elicited little more than a legal conclusion and not the underlying facts to overcome possibility of particular defense, guilty plea was improvident).

(c) Key #151.

(1) *Minter*, 17 M.J. 542 (A.C.M.R. 1983) (although MJ did not go into the same detail for all eight larceny specifications, detailed stipulation of fact set forth factual basis for every element of the offense).

(2) *Sawinski*, 16 M.J. 808 (N.M.C.M.R. 1983) (stipulation of fact alone, without further inquiry, is insufficient to establish providence of plea.

(3) *Lee*, 16 M.J. 278 (C.M.A. 1983) (inquiry must elicit from accused facts surrounding offense charged to establish factual basis for finding of guilty).

(4) *Sheehan*, 15 M.J. 724 (A.C.M.R. 1983) (MJ not required to instruct accused as he would a court-martial; rather, factual predicate for guilty plea must be clearly reflected in record).

(5) *Auman*, 14 M.J. 641 (A.C.M.R. 1982) (MJ should reject guilty plea if he cannot elicit accused's admission that he entertained requisite intent; but arbitrary rejection of guilty plea may be abuse of discretion).

(6) *Goins*, 2 M.J. 458 (A.C.M.R. 1975) (MJ must elicit facts rather than accused's acknowledgement of guilt in terms of legal conclusions).

(d) Key #152.

(1) *Harclerode*, 17 M.J. 981 (A.C.M.R. 1984) (plea improvident where MJ corectly instructed on offense elements but failed to elicit factual predicate. However, when MJ recited elements of other offenses and was told by accused that he understood the elements and had no questions that the elements taken together described his conduct, pleas to these offenses would be upheld where there was no suggestion of inconsistency although he should have also asked accused to describe the conduct).

(2) *Bethea*, 3 M.J. 526 (A.F.C.M.R. 1977) (MJ's failure to inquire further into matters which would have been indicative of requisite *mens rea* rendered guilty plea improvident).

6. Where issue raised, did MJ explain difference between responsibility as a principal and as an aider and abettor?
Key #151; MCM 156; UCMJ art. 77.

(a) *Chasteen*, 17 M.J. 580 (A.F.C.M.R. 1983) (MJ's failure to discuss fact that accused's criminal liability was based on law of principals did not render improvident an otherwise informed guilty plea).

(b) *Radzewicz*, 16 M.J. 781 (A.C.M.R. 1983) (MJ's failure to explain to accused law of aiding and abetting to insure that accused understood that he must share intent of active perpetrator required reversal).

(c) *Lee*, 16 M.J. 532 (A.C.M.R. 1983) (while MJ should have inquired into the facts as well as expressly advise accused about his criminal responsibility as an aider and abettor, failure to do so did not render plea improvident where specification itself advised accused that he was charged with sharing criminal responsibility with another for the offense).

(d) *Crouch*, 11 M.J. 128 (C.M.A. 1981) (MJ's failure to advise accused about shared intent for aiding and abetting did not render providence inquiry fatally deficient as accused's admissions showed he was aider and abettor).

(e) *Craney*, 1 M.J. 142 (C.M.A. 1975) (MJ erred by not inquiring into accused's understanding of difference between principal and his position as aider and abettor).

7. Did accused fail to admit an element of the offense?

(a) Dishonorable. In bad check case, did accused admit that his failure to maintain sufficient funds was dishonorable?
Key #148.
Gibson, 1 M.J. 714 (A.F.C.M.R. 1975) (MJ's failure to inquire into accused's acts to determine whether indicative of bad faith or gross indifference rendered pleas improvident).

(b) Prejudicial to good order and discipline. In Art. 134 case, did accused formally admit this element?

(1) Key #147.
Stener, 14 M.J. 972 (A.C.M.R. 1982) (accused must admit that alleged conduct was prejudicial to good order and discipline, but need not explain how).

(2) Key #151.
Arrington, 5 M.J. 756 (A.C.M.R. 1978) (where accused discussed offenses and admitted prejudicial to good order and discipline, MJ did not have to determine how, in accused's opinion, accused's acts were prejudicial to good order and discipline).
Hatley, 14 M.J. 890 (N.M.C.M.R. 1982) (although MJ did not inquire of accused if conduct was prejudicial to good order and discipline, MJ concluded as a matter of law, with adequate support in the ROT, that the conduct was prejudicial to good order and discipline).

(c) Duty to act/obey. If accused is charged with affirmative duty, did inquiry show that it was possible for accused to comply?
Key #147.
Young, 6 M.J. 975 (A.C.M.R. 1979) (because order given to accused may have been impossible to perform, MJ's failure to inquire resulted in deficient providence inquiry).

(d) Variance between crime charged and admitted?
Key #147.
Felty, 12 M.J. 438 (C.M.A. 1982) (technical variance between offense alleged and that admitted to by accused did not render plea improvident).

8. If accused set up matters/stated facts inconsis-

tent with plea, did the MJ resolve the inconsistency/require accused to personally recant?

(a) Key #142; MCM 70*b*(5), 75*a*(3); UCMJ art. 45(a). RCM 910(e) provides that MJ shall ensure there is a factual basis for the plea; RCM 910(h)(2) discusses inconsistent matters arising after findings but before sentencing.
  (1) *Lee*, 16 M.J. 278 (C.M.A. 1983) (in deciding providence, question only whether accused made inconsistent statement; statement did not have to be credible).
  (2) *Daly*, 15 M.J. 739 (N.M.C.M.R. 1983) (accused's plea of guilty to charge of unauthorized absence was provident even though specification alleged inception date to be later than date on which accused admitted that unauthorized absence began).
  (3) *Olson*, 7 M.J. 898 (A.F.C.M.R. 1979) (providence does not require accused's memory of the conduct).

(b) Key #146.
Moglia, 3 M.J. 216 (C.M.A. 1977) (guilty plea must be in accordance with actual facts).

(c) Key #147.
  (1) *Stener*, 14 M.J. 972 (A.C.M.R. 1982) (accused must admit that alleged conduct was prejudicial to good order and discipline or service discrediting but need not explain how).
  (2) *Brock*, 13 M.J. 766 (A.F.C.M.R. 1982) (plea was provident even though AWOL charge stated was one day after actual inception date).

(d) Key #148.
  (1) *Matthews*, 16 M.J. 354 (C.M.A. 1983) (if accused makes statement that is inconsistent with guilty plea, MJ must resolve inconsistency or reject the guilty plea). *See also Davenport*, 9 M.J. 364 (C.M.A. 1980).
  (2) *Gaffney*, 17 M.J. 565 (A.F.C.M.R. 1983) (accused's unsworn statement that he had no criminal intent was an apology, not a statement rendering plea improvident).
  (3) *Valenzuela*, 15 M.J. 699 (A.C.M.R. 1983) (accused's statement that he voluntarily abandoned his intent to rape was not inconsistent with his plea of guilty, as abandonment is not a defense in the military).
  (4) *Watkins*, 14 M.J. 803 (A.C.M.R. 1982) (accused's statements showed guilt as to different offense and confusion on his part as to issues involved; MJ's failure to further inquire rendered plea improvident).
  (5) *Neely*, 15 M.J. 505 (A.F.C.M.R. 1982) (raising mere possibility of defense is not inconsistent with GP).
  (6) *Turner*, 11 M.J. 784 (A.C.M.R. 1981) (where matter raised by accused is not truly inconsistent with GP and based on some reasonable ground, plea not improvident).
  (7) *Barnes*, 12 M.J. 799 (A.C.M.R. 1981) (matters presented must reasonably raise a defense to constitute an inconsistency and it is not sufficient to show a mere possibility that the defense exists).
  (8) *Melancon*, 11 M.J. 753 (N.M.C.M.R. 1981) (although accused's opinon was that he was not disrespectful, his words in context clearly showed guilt, so plea was provident).

9. Did MJ inquire into potential defenses?
(a) RCM 910(e) discussion provides that the MJ should explain defenses to the accused.
(b) Key #151.
  (1) *Jemmings*, 1 M.J. 414 (C.M.A. 1976) (where accused's responses during providence inquiry suggest possible defense, MJ should explain elements of defense to insure it is not available).
  (2) *Timmins*, 45 C.M.R. 249 (C.M.A. 1972) (MJ has obligation to discover from accused *his* attitude regarding potential defense).
(c) Innocence as a matter of law.
Key #142.
Leverette, 9 M.J. 627 (A.C.M.R. 1980) (GP is improvident if accused is innocent as a matter of law). *See also Cook*, 7 M.J. 623 (N.C.M.R. 1979).
(d) Intoxication. Did any of the offenses require specific intent, knowledge, or a specific state of mind? *See* Kaczynski, *"I Did What?" the Defense of Involuntary Intoxication"*, The Army Lawyer, April 1983, at 1.
MCM 216*h*; Key #147. RCM 916(c)(2) discusses voluntary intoxication as a defense.
  (1) *Martinez*, 14 M.J. 647 (A.C.M.R. 1982) (where knowledge was element of offense and accused had been drinking heavily, remembered nothing and based GP solely on bystanders' account, failure by MJ to inquire further improvidenced plea).
  (2) *Baysinger*, 11 M.J. 896 (A.F.C.M.R.

1981) (accused's statement during sentencing that he "was kind of intoxicated" was insufficient to demonstrate any reasonable possibility of impaired mental capacity).

(3) *Whelehan*, 10 M.J. 566 (A.F.C.M.R. 1980) (record indicated that voluntary intoxication impaired accused's capacity to form the requisite specific intent, thereby improvidencing plea).

(4) *Luebs*, 20 C.M.A. 475, 43 C.M.R. 315 (1971) (GP may be provident although accused was too intoxicated to remember events).

(e) Agency. Did the accused buy drugs to assist another? *See* Harper, *The Defense of Agency. . . . A Handy Trial Tool for the Offensive Minded*, 12 Advocate 16 (1980).
Key 147.
Buske, 2 M.J. 475 (A.C.M.R. 1975) (MJ's failure to elicit underlying facts to overcome obvious possibility of defense of agency rendered plea improvident).

(f) Innocent possession. Did accused claim a lawful purpose?
Key #152.
Russell, 2 M.J. 433 (A.C.M.R. 1975) (where accused's responses raised defense of lawful possession, MJ's failure to make more searching inquiry rendered plea improvident).

(g) Impossibility or inability. Was it impossible for accused to do what he had a duty to do? MCM 216*g*; Key #63. RCM 916(i) discusses inability as a defense.

(1) *Lee*, 16 M.J. 278 (C.M.A. 1983) (where accused's statements raised defense of impossibility, MJ's failure to resolve inconsistency caused improvident plea).

(2) *Lee* 14 M.J. 633 (A.C.M.R. 1982) (discusses availability of defense of impossibility to AWOL).

(3) Key #147.
Young, 6 M.J. 975 (A.C.M.R. 1979) (where order may have been impossible to perform, MJ's failure to inquire into matter improvidenced plea).

(4) Key #149.
Irving, 2 M.J. 967 (A.C.M.R. 1976) (sickness amounting to physical incapacity to report or otherwise comply with order is defense to AWOL; MJ's acceptance of GP was error).

(h) Insanity. Do the facts suggest that accused had a mental disease or defect?

(1) RCM 916(k) discusses lack of mental responsibility.

(2) Key #142.
Peterson, 1 M.J. 972 (N.C.M.R. 1976) (accused's statement that "it was like the devil was in me and it told me to pick up this" raised lack of mental responsibility; MJ's failure to inquire rendered plea improvident).

(3) Key #144.
Herald, 17 M.J. 1118 (N.M.C.M.R. 1984) (where accused informed court that he was hospitalized for psychiatric treatment due to suicidal and homicidal tendencies, MJ's failure to inquire into possible defense of insanity improvidenced plea).
George, 6 M.J. 880 (A.C.M.R. 1979) (plea was provident where testimony did not indicate that accused's condition constituted mental disease or defect).

(4) Key #151.
Bardwell, 16 M.J. 672 (A.C.M.R. 1983) (where no evidence of lack of mental responsibility was presented to court, MJ had no duty to explain defense or conduct further inquiry).

(i) Claim of right. In a larceny or wrongful appropriation case, did accused believe that he had a right to use the property?

(1) Key #58.
Cunningham, 14 M.J. 539 (A.C.M.R. 1982) (claim of right rule applies to taking specific property; but does not apply to taking of money or valuables of definite value in liquidation of uncertain obligation for money value).

(2) Key #147.
Sanders, 7 M.J. 913 (A.C.M.R. 1979) (plea to wrongful appropriation was improvident where MJ failed to inquire into underlying rental contract terms to insure there was no defense and that breach of contract was criminal).

(3) Key #148.
Smith, 14 M.J. 68 (C.M.A. 1982) (where accused stated that money taken by him by force was for debt assigned to him, GP to robbery was improvident).

(j) Duress. Did accused commit offense to prevent physical harm to himself or another?

(1) MCM 216*f*. RCM 916(h) discusses the defense of duress.

(2) Key #142.
Jemmings, 1 M.J. 414 (C.M.A. 1976)

(where accused stated that he feared that his family was in imminent danger if he did not cooperate in the housebreaking enterprise, and higher authorities would not help, plea was improvident).
Roby, 49 C.M.R. 544 (C.M.A. 1975) (plea to AWOL was improvident where accused feared being beaten upon return to his unit).

(3) Key #147.
Montford, 13 M.J. 829 (A.C.M.R. 1982) (accused's statement that he went AWOL to protect family from "harassment" was insufficient to show threat of immediate serious harm).
Palus, 13 M.J. 179 (C.M.A. 1982) (GP was improvident where accused stated that he committed the crimes to save his family from physical harm).
Barnes 12 M.J. 779 (A.C.M.R. 1981) (nexus required between threat and the crime committed; so where accused stated that to avoid threat, he was coerced to pay debt, not commit robbery, defense of duress not raised).

(k) Mistake of fact. Would accused's conduct have been lawful if facts were as he reasonably believed them to be? *See* Harper, *Applying the "Mistake of Fact" Defense*, 13 Advocate 408 (1981).
MCM 216*i*. RCM 916(j) discusses mistake of fact.
Jack, 10 M.J. 572 (A.F.C.M.R. 1980) (plea was provident because no hint in record that supposed mistake of fact was honest or reasonable).

(1) "Color of law." Did accued believe that he was acting on behalf of CID, CO, etc.?

(m) Lack of criminal intent. Did accused state that he acted to teach a friend a lesson, as a joke, etc.?

(1) *Gaffney*, 17 M.J. 565 (A.F.C.M.R. 1983) (accused's unsworn statement that he had no criminal intent did not conflict with plea where he did not raise accident, mistake of act or duress).

(2) *Roark*, 13 C.M.R. 64 (C.M.A. 1961) (no criminal intent is a defense to larceny or wrongful appropriation; accused took property to teach friend to safeguard his property).

(n) Self-defense raised?
MCM 216*c*. RCM 916(e) discusses self-defense.

(o) Drugs: Substance sold not a controlled substance?
Key #148.
Collier, 3 M.J. 932 (A.C.M.R. 1977) (plea was improvident where accused's statement that he sold brown sugar raised defense to charge of attempted transfer of heroin).

(p) Drugs: Variance in amount.
Hernandez, 16 M.J. 674 (A.C.M.R. 1983) (if possession of some amount of marijuana is admitted, precise amount is irrelevant for purposes of substaining providence of plea; but modify amount to that admitted).

(q) Drugs: Attempt—substantial step.
Key #147.
Presto, 17 M.J. 1105 (A.C.M.R. 1984) (accused's acts constituted a substantial step toward sale of marijuana; GP to attempted sale was provident).

(r) Entrapment raised?

(1) MCM 216*e*. RCM 916(g) discusses subjective entrapment.

(2) Key #69.
Vanzandt, 14 M.J. 332 (C.M.A. 1982) (extensive subjective entrapment discussion).

(3) Key #147.
Dyson, 16 M.J. 907 (N.M.C.M.R. 1983) (where MJ was clearly aware of issue of entrapment and factual basis was clearly established, GP was provident).

(4) Key #151.
Collins, 17 M.J. 901 (A.F.C.M.R. 1983) (where entrapment defense appeared available, MJ erred in accepting GP without asking accused his position).
Diaz-Padilla, 17 M.J. 752 (A.C.M.R. 1984) (MJ did not abuse his discretion in calling witness during guilty plea inquiry where accused could not provide information on whether government agent objectively entrapped accused into selling marijuana).
Gerstner, 15 M.J. 759 (A.F.C.M.R. 1983) (where MJ made exhaustive inquiry and accused admitted that defense of entrapment did not apply, GP was provident).
Dejong, 13 M.J. 721 (N.M.C.M.R. 1982) (where accused raised possibility of defense of entrapment, MJ was required to discover accused's attitude regarding the potential defense, and factual basis therefor).

(s) Letter of innocence?

(t) False official statement—No obligation to make statement.

McKnight, 13 M.J. 974 (A.C.M.R. 1982) (plea to making false official statement was improvident where accused was under no obligation to make statement).

(u) Abandonment.
Valenzuela, 15 M.J. 699 (A.C.M.R. 1983) (military law does not recognize voluntary abandonment as defense to attempt to commit a crime).

10. Did MJ correctly state and explain the maximum sentence authorized on conviction and that appellant could receive such a sentence?
(a) MCM 70*b*(2); RCM 910(c)(1).
Table of Maximum Punishments—MCM 127*c*; RCM Appendix 12, sentencing for officers—MCM 126*d*; RCM 810(d) Jurisdictional Limits of Courts-Martial—UCMJ arts. 18, 19, 20.
(b) Fines—Key #151, 152.
(1) *Florencia*, 16 M.J. 792 (C.G.C.M.R. 1983) (although MJ did not advise accused that a fine was an authorized punishment, sentence including a fine was not illegal where accused was aware of and sought that very punishment in lieu of others).
(2) *Shirley*, 16 M.J. 567 (A.C.M.R. 1983) (although MJ did not advise about fine, accused was aware of possibility through PTA and was not substantially misled).
(3) *Holmes*, 15 M.J. 1036 (A.C.M.R. 1983) (MJ's failure to advise accused that maximum punishment included fine was error; where total forfeitures were also in sentencing, fine was disapproved).
(4) *Combs*, 15 M.J. 743 (A.F.C.M.R. 1983) (where MJ failed to advise accused that maximum punishment included fine, portion of original sentence dealing with fine was illegal).
(c) Maximum punishment misstated?
Key #143, 151, 152.
(1) *Cato*, 17 M.J. 1108 (A.C.M.R. 1984) (although MJ overstated maximum punishment by one year, accused was not misled by subsantial misapprehension).
(2) *Lalla*, 17 M.J. 622 (N.M.C.M.R. 1983) (where MJ failed to advise accused that additional punishment of BDC is imposable by escalator clause, test is whether accused was materially misled in decision to plead guilty and whether he thereby suffered any material prejudice).
(3) *Tenny*, 15 M.J. 779 (A.C.M.R. 1983) (examine maximum punishment for offenses to which accused pled guilty, not just those affirmed, to determine if accused was misled by substantial misapprehension regarding maximum punishment).
(4) *Hunt*, 10 M.J. 222 (C.M.A. 1981) (GP need not be vacated even where accused was not aware that maximum sentence may be lower than perceived; must consider all circumstances to see if this was insubstantial factor in decision to plead).
(5) *Walls*, 9 M.J. 88 (C.M.A. 1980) (substantial misapprehension of maximum sentence may vitiate plea of guilty, whether caused by DC or MJ advice; must consider all circumstances).
(6) *Brewster*, 7 M.J. 450 (C.M.A. 1979) (where MJ advised that maximum authorized punishment would include confinement for 20 years and correct advice was 10 ten years, GP was improvident).
(7) *Castrillon-Moreno*, 7 M.J. 414 (C.M.A. 1979) (where MJ incorrectly advised accused that maximum punishment was ten years rather than two, plea was improvident).
(8) *Frangoules*, 1 M.J. 467 (C.M.A. 1976) (where MJ imposes sentence based on significant miscalculation of maximum punishment, reassessment is appropriate).
(9) *Harden*, 1 M.J. 258 (C.M.A. 1976) (substantial misunderstanding as to maximum sentence by accused may improvidence plea; here, 10-year difference improvidenced plea).

11. Did MJ impose any conditions on acceptance of plea (waiver of motions/naming drug supplier, etc.)?
Key #141.
Johnson, 12 M.J. 673 (A.C.M.R. 1981) (MJ abused discretion in requiring accused to name supplier as unnecessary condition in acceptance of plea).

12. If MJ rejected guilty plea, did he recuse himself?
Key #86; MCM 62*f*(10). RCM 910(h)(2) discusses recusal. The discussion states that in trial by MJ alone, rejection of plea after findings will ordinarily require recusal.
(a) *Cooper*, 8 M.J. 5 (C.M.A. 1979) (no need for recusal where MJ rejected plea even though he said he would "probably" accept plea if accused did not claim innocence).
(b) *Bradley*, 7 M.J. 332 (C.M.A. 1979) (where MJ accepted GP and accused later withdrew plea, MJ erred by not recusing himself or

directing trial by members).

(c) *Lewis*, 6 M.J. 43 (C.M.A. 1978) (no need for recusal where MJ disclaimed any bias against accused as result of anything he heard in co-actor's trial).

13. Did MJ find:
    (a) That there was a knowing and conscious waiver of rights by accused?
    MCM 70*b*(2); RCM 910(c)(4) and (i) discuss waiver. RCM 910(a)(2) discusses conditional pleas.
    (b) That the plea was voluntary?
    MCM 70*b*(3); RCM 910(d) discusses voluntary plea.
    (c) That accused understood meaning and effect of plea? MCM 70*b*(3); RCM 910(h)(2) provides that MJ shall not accept plea unless the accused understands meaning and effect.
    (d) That admission of plea was based on factual guilt? MCM 70*b*(2); RCM 910(e) provides that MJ shall not accept plea without eliciting factual basis from accused.
14. Did the MJ refuse accused's request to change plea from guilty to NG after findings but before sentencing?
    (a) MCM 70*b*(5); RCM 910(h)(1) deals with withdrawal of GP.
    (b) Key #141, 148.
    Young, 2 M.J. 472 (A.C.M.R. 1975) (after GP accepted request to withdraw does not by itself improvidence plea; accused must set up something truly inconsistent to withdraw plea; matter is within MJ's discretion).
15. Do allied papers or post-trial allegations indicate matter inconsistent with plea?
    Key #317.
    (a) *Turner*, 11 M.J. 784 (A.C.M.R. 981) (ACMR may consider matters contained in entire record, including Art. 32 investigation, in determining providence of plea).
    (b) *Joseph*, 11 M.J. 333 (C.M.A. 1981) (review court will not consider accused's post-trial allegations contrary to factual representations made at trial).
    (c) *Davenport*, 9 M.J. 364 (C.M.A. 1980) (review court will generally not consider matter outside record to redetermine providence of plea).
    (d) *Davis*, 3 M.J. 430 (C.M.A. 1977) (although CMA is generally precluded from considering allied papers, it may consider them and extra-record matter in determining adequacy of counsel).
    (e) *Johnson*, 1 M.J. 36 (C.M.A. 1975) (review court may consider "true facts" from outside record in determining providence of plea; here, contrary facts were in Art. 32 investigation).
16. Was accused confused over collateral consequences of plea?
    (a) Key #143.
    (1) *Hannan*, 17 M.J. 115 (C.M.A. 1984) (accused's and DC's expectations that he would be eligible for parole did not induce GP, so plea not improvident).
    (2) *Bedania*, 12 M.J. 373 (C.M.A. 1982) (if collateral consequences are relied upon to contest providence of GP, accused may succeed only when those consequences are major and accused's misunderstanding; (a) clearly results from PTA; (b) is induced by MJ's comments; or (c) is made apparent to MJ who then fails to correct misunderstanding).
    (b) Key #150, 151.
    (1) *Cooper*, 17 M.J. 1062 (A.F.C.M.R. 1984) (record did not indicate any agreement between accused and CA regarding substitution of general discharge for BCD adjudged in return for accused's cooperation in other cases).
    (2) *Bedania*, 12 M.J. 373 (C.M.A. 1982) (while MJ may discuss with accused collateral consequences of GP, he has no obligation to do so).
    (3) *Miles*, 12 M.J. 377 (C.M.A. 1982) (even where PTA has discharge suspension provision, MJ has no obligation to discuss collateral consequences, such as administrative discharge; here, MJ not put on notice of accused's misunderstanding, no *Goode* response, accused's post-trial affidavit submitted very late).
    (4) *Sena*, 6 M.J. 775 (A.C.M.R. 1978) (accused's alleged mistaken understanding as to effect of PTA provision concerning entitlement to pay during confinement period did not materially affect providence).
    (5) *Santos*, 4 M.J. 610 (N.C.M.R. 1977) (where conduct of accused and DC before, during, and after trial showed accused believed discharge suspension provision in PTA would prevent administrative discharge for same offense, GP was improvident if government initiated such administrative discharge proceeding).
17. Was DC inadequate?
    Key #232.

(a) *Jefferson*, 13 M.J. 1 (C.M.A. 1982) (accused is entitled to reasonably competent counsel who exercises that competence in client's behalf through trial; lists several considerations).
(b) *Myles*, 7 M.J. 132 (C.M.A. 1979) (if inadequate representation, new trial required; if breach does not rise to this level, test for prejudice to see if error materially prejudiced substantial rights of accused).
(c) *Dusenberry*, 49 C.M.R. 536 (C.M.A. 1975) (unless accused can prove serious derelictions on the part of DC to show that his plea was not a knowing and intelligent act, he is bound by either his own or DC's assessment of the law and facts).

18. Was accused or any court personnel under influence of drugs, alcohol, insane, etc., at the time of trial?

Key #300.
(a) *Ridley*, 12 M.J. 675 (A.C.M.R. 1981) (where accused took stand and responded intelligently, no one at trial raised issue, and accused did not later question his mental ability to take stand, alleged use of drugs did not require court to determine whether accused understood proceedings).
(b) *Waters*, 35 C.M.R. 580 (A.B.R. 1965) (CA could order rehearing over accused's objection where DC allegedly under influence of alcohol at trial).
(c) *Sanders*, 373 U.S. 1 (1963) (even if record disclosed no irregularities, rehearing is required where defendant was allegedly under the influence of drugs at trial). Likewise, *Doyle v. State*, 411 A.2d 907 (R.I. 1980) (marijuana).

Legal Assistance Items

Legal Assistance Branch, Administrative & Civil Law Division, TJAGSA

ID Card Procedures For Qualifying Former Spouses

A synopsis of the text of a message issued by The Adjutant General was published in the February 1985 issue of *The Army Lawyer*. Additional guidance was issued by message on 15 January 1985 answering several questions which ID card issuing facilities have been receiving and upon which there has been confusion.

For unremarried former spouses (referred to as URFS in the message) divorcing prior to 1 January 1985, the effective date for medical care is 1 January 1985 or the date that URFS cancelled his or her employer-sponsored health plan under the Former Spouses Act, whichever date is *later*.

For a URFS divorcing after 1 Janaury 1985, the effective date for medical care is that specified in Table C-2 of AR 640-3, Identification Cards, or the date that the former spouse cancelled his or her employer-sponsored health plan to qualify for medical benefits, whichever date is *later*.

Additionally, the following specific questions were addressed:

A. QUESTION: *What qualifies as an employer-sponsored health plan?*
ANSWER: Any health plan provided through the URFS's employer, whether or not the former spouse has payroll deductions to cover the cost of participating in the health plan.

B. QUESTION: *Can the period of the marriage in 20/20/15 determination be less than 20 years?*
ANSWER: No. All qualifying URFS including 20/20/15 must have been married to the member for a minimum of 20 years.

C. QUESTION: *If the military sponsor retired because of physical disability, can the URFS qualify for benefits?*
ANSWER: Only if the member had at least 20 years of creditable service before being placed on the retired list. The member's time on the temporary disability retired list (TDRL) does not count toward creditable service.

D. QUESTION: *Who signs item 62 of the DD Form 1172 for the URFS?*
ANSWER: The URFS signs the DD Form 1172.

E. QUESTION: *Can a combination of 20 years of marriage to two or more military sponsors be used to qualify an URFS for benefits and privileges?*
ANSWER: No. All 20 years of marriage must have been to one military sponsor.

F. QUESTION: *If the former spouse remarries after the divorce from the uniformed services member and that remarriage terminates due to death of mate or divorce, dissolution, or annulment, can the former spouse qualify for benefits under Public Laws 97-252 and 98-525?*
ANSWER. No. If the former spouse ever remarries, he or she is no longer eligible.

G. QUESTION: *Can the DD Form 214 alone be used to verify the member's creditable service?*
ANSWER: Not always. For officers whose active service has been continuous without interruption and the DD Form 214 shows a net service for the applicable period of the DD Form 214 to be in excess of 20 years, then that DD Form 214 alone can be used. For all others, *i.e.*, enlisted careerists, warrant officers, member who changes components, etc., the verifying officer must review each DD Form 214 or a complete statement of military service in order to verify that the member's creditable service was concurrent with 15 or 20 years of the marriage.

Model Interstate Income Withholding Act

The Child Support Projects of the American Bar Association and the National Conference of State Legislatures have drafted a Model Interstate Income Withholding Act which is designed to coincide with and implement provisions of the Child Support Enforcement Amendments of 1984, Pub. L. 98-378.

The model act is of interest to legal assistance attorneys because both Child Support Projects are encouraging state legislatures to adopt the act. If adopted, it would be a primary mechanism through which support orders and decrees entered against service members are enforced.

Following is a summary of the act prepared by G. Diane Dodson and Robert Horowitz of the ABA Child Support Project and Deborah Dale, National Conference of State Legislatures Staff Liaison.

Introduction

The Model Interstate Income Withholding Act, hereinafter referred to as the Act, deals with two of Congress' key goals in enacting the Child Support Enforcement Amendments of 1984, Public Law 98-378: 1. establishing a system for quick, efficient collection of support obligations throughout the country by use of income withholding systems, and 2. improving the interstate enforcement of support obligations.

These goals merge in the 1984 Amendments' requirement that each state extend its income withholding system to enforce support orders issued by sister states:

> The State must extend its withholding system under this subsection so that such system will include withholding from income derived within such State in cases where the applicable support orders were issued in other States, in order to assure that child support owed by absent parents in such State or any other State will be collected without regard to the residence of the child for whom the support is payable or such child's custodial parent. Social Security Act §466(b)(9), 42 U.S.C. §666(b)(9).

The federal Office of Child Support Enforcement requested the American Bar Association and the National Conference of State Legislatures to convene an advisory group of experts to help develop a model interstate income withholding statute with commentary. . . . Areas of expertise provided by members of the group included family law, constitutional law, conflicts of law, and intra- and inter-state support enforcement. Representatives from the federal Office of Child Support Enforcement also participated. The advisory group's role included assuring that the Model Act meets the requirements of Social Security Act §466(b)(9), quoted above. These additional requirements are summarized at the end of this introduction.

Reasons for a New Statutory Provision

The advisory group concluded that new model legislation was needed to help states meet the interstate withholding requirements of the 1984 Amendments by October 1, 1985 (with some exceptions for states with later legislative sessions when legislative changes are required). This necessitated making model legislation available to legislative drafters in advance of legislative sessions which began in January 1985.

The advisory group also concluded that it was beneficial to create a simple procedure for interstate withholding which merely ties into the state's intrastate system and borrows heavily from its procedures. The chief advantages of this nexus between the interstate and intrastate withholding laws are that it encourages placing responsibility for the inter- and intrastate withholding in the same agency and facilitates use of the state's regular income withholding procedures.

Principles Guiding Drafting of the Model Interstate Income Withholding Act

In addition to the benefits of the Act noted above, several guiding principles were incorporated into this Act:

1. Choice-of-law questions are to be clearly resolved. To the extent possible, the income withholding laws of the state which will impose and enforce the withholding are used so that the court or agency responsible for enforcing them is following familiar procedures.

2. States adopting this Model Act will concurrently modify or will have already modified their income withholding schemes to conform to the Social Security Act §§466(b)(1)-(10) for intrastate income withholding. See discussion in the section that follows. If that is not the case, additional matters will have to be covered in the interstate act.

3. The state will enforce sister state orders by income withholding through whatever legal process, judicial, quasi-judicial or administrative, is used for intrastate cases. A court in the state being asked to impose withholding need only be involved if the court normally has jurisdiction to hear contests to income withholding on support orders of its own state.

4. Some of the practical problems frequently experienced in interstate enforcement, for example, rejecting papers that are not in correct local form, should be specifically addressed.

5. When income is derived out-of-state, interstate income withholding must be pursued.

6. Jurisdiction to modify a support order should not be ceded to the state withholding income (forum state), since neither the obligee nor child reside there.

In addition, it was assumed that most states would follow the specific notice provisions of the Amendments and would not be relying on Social Security Act §466(b)(4)(B), 42 U.S.C. §666(b)(4)(B) which "grandfathers" in existing withholding procedures in a handful of states. In those states, and in the few states which provide no opportunity to contest withholding because it is instituted automatically and immediately in each case, some modifications in local income withholding procedures for interstate cases will be necessary. . . .

Income Withholding Requirements of the 1984 Child Support Amendments

As previously noted, this Act is keyed to the state's intrastate withholding system. In order to comply with the Child Support Enforcement Amendments of 1984, the following requirements must be met:

1. As of October 1, 1985 (with the exception noted earlier), every support order issued or modified in the state will include "provision for withholding from wages."
2. The withholding process must be commenced for all IV-D (welfare) clients, without the client applying for it, and without amendment to the underlying support order, when the arrearages are equivalent to one month's support, or sooner at the state's election or when requested by the obligor.
3. Advance notice of the proposed withholding must be sent to the obligor (except in states which in August 1984 had a

system of withholding in effect which met state due process requirements, but did not provide advance notice).

4. The obligor may contest withholding, but his defenses are limited to mistakes of fact, e.g., miscalculation of amount owed. Requests to modify custody or support orders may not be raised in defense, nor may denial of visitation. These matters must be raised in other proceedings.
5. The state must notify the obligor within 45 days of the advance notice of the withholding decision in contested cases.
6. Amounts to be withheld are limited by the Federal Consumer Credit Protection Act, §303(b).
7. Employers must comply with withholding orders and will be liable for any amounts not withheld after receiving proper notice. State law must also have a fine provision for any employer who fires, disciplines or refuses to hire an obligor because of the support withholding obligation.
8. Employers need not change their regular payroll pattern and may combine all withheld amounts into one check, with an itemized statement showing amounts attributable to each employee.
9. State law must provide for terminating withholding.
10. State law must give priority to child support withholding over any other legal process brought under state law against the same wages.
11. Wages must be subject to withholding; a state may extend withholding to cover other sources of income.
12. The state must designate a public agency or a publicly accountable private agency to administer the withholding program, to distribute amounts withheld, and to monitor payments.

Copies of the Model Interstate Income Withholding Act, with Comments, may be obtained by writing the Office of Child Support Enforcement, Social Security Administration, U.S. Department of Health and Human Services, Baltimore, Maryland 21235.

Tax News

Tax Refund Discounting

As the deadline for filing income tax returns approaches, legal assistance officers should be wary of businesses which offer to discount income tax returns. Many businesses have been guilty of discounting income tax returns in the past few years. Soldiers should be made aware that the practice violates federal law and often victimizes the taxpayer due to the excessive discount rates charged.

The usual practice is for discounters to advertise that they will give immediate cash for assignment of income tax return refunds. The discounters generally prepare the returns for the individual and discount them for immediate cash. Some discounters, *.e.g.*, automobile dealers, use the discounted refund as down payment on a purchase. The discounter and taxpayer execute documents assigning the refund to the discounter. In addition, the taxpayer executes a power of attorney giving the discounter the right to receive and negotiate the refund check. The discounter's address is substituted for the taxpayer's address. The refund check, when recevied, is cashed or deposited in the discounter's account.

The assignment of income tax refunds violates 31 U.S.C. §3727. Although the authorized representative may receive a refund check payable to another, the representative may not endorse another's check. A refund check may be negotiated under a specific power of attorney executed after the issuance of the check to the recipient. Discounters obviously do not do this because they would lose control by having the check go first to the taxpayer. A return preparer who endorses or otherwise negotiates a refund check of another is liable for a $500 penalty for each check negotiated. I.R.C. §6695 (f).

An injunction may be sought to preclude businesses from discounting income tax returns. The legal assistance office at Fort

Campbell, Kentucky, in conjunction with the IRS and local U.S. Attorney, has successfully brought an action against a discounter to enforce the tax laws.

The damage to the service member is often the amount of the discount charged. Discounters generally charge between 20 and 50% for discounting a tax refund. Although this seems like an outrageous charge, many service members have fallen prey to this offer because it provides instant cash or an instant down payment. Legal assistance officers can assist soldiers by publicizing the illegality and dangers of discounting and by encouraging soldiers to file for their refunds early. Additionally, the Armed Forces Disciplinary Control Board and IRS should be made aware of any known discounting of tax refunds. An aggressive preventive law program should be pursued to prevent problems in this area.

IRAs

Clients who have IRAs should be reminded that to be deductible against 1984 taxes, contributions to an IRA must be made by 15 April 1985. In the past, taxpayers were permitted to make deductible contributions any time before the deadline for filing their return, including extensions of the time for filing the return. The Tax Reform Act of 1984 changed the law. Now, even if the taxpayer obtains an extension of time in which to file the return, the taxpayer must make any contributions to an IRA by 15 April 1985 if the taxpayer wants to deduct the contribution on the 1984 tax return.

Minnesota Military Power of Attorney Provisions

Captain Douglas T. Peterson, a Reserve judge advocate with the 214th JAG Detachment, St. Paul, Minnesota, provided the following information concerning a new, all-encompassing Minnesota Power of Attorney statute which took effect 1 August 1984. The statute, to be codified at MINN. STAT. §508.82(1982), authorizes a statutory short form of general power of attorney in which the grantor simply checks a line in front of one or more enumerated powers on the standard form. The form also contains a section in which the grantor may check a line to make the power of attorney either durable or non-durable.

The statute specifically recognizes any Minnesota power of attorney in existence before the effective date of the statute and any power of attorney executed under the law of another state or country. One of the enumerated powers of interest to legal assistance officers pertains to "benefits from military service." This section, subdivision 12, provides:

BENEFITS FROM MILITARY SERVICE

In a statutory short form power of attorney, the language conferring general authority with respect to benefits from military service, means that the principal authorizes the attorney in fact:

(1) to execute vouchers in the name of the principal for any and all allowances and reimbursements payable by the United States or by any state or subdivision of a state to the principal, including, by way of illustration and not of restriction, all allowances and reimbursements for transportation of the principal and his dependents, and for shipment of household effects, to receive, endorse, and collect the proceeds of any check payable to the order of the principal drawn on the treasurer or other fiscal officer or depository of the United States or of any state or subdivision of a state;

(2) to take possession and order the removal and shipment of any property of the principal from any post, warehouse, depot, dock, or other place of storage and safekeeping, either governmental or private, to execute and deliver any release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument which the attorney-in-fact deems desirable or necessary for that purpose;

(3) to prepare, file, and prosecute the claim of the principal to any benefit or assistance, financial or otherwise, to which the principal is, or claims to be, entitled under the provisions of any statute

or regulation existing at the time of execution of the power of attorney or enacted after that time by the United States or by any state or by any subdivision of a state or by any foreign government, which benefit or assistance arises from or is based upon military service performed prior to or after the execution of the power of attorney by the principal or by any person related by blood or marriage to the principal, to execute any receipt or other instrument which the attorney-in-fact deems desirable or necessary for the enforcement or for the collection of that claim;

(4) to receive the financial proceeds of any claim of the type described in this subdivision, to conserve, invest, disburse, or use anything so received for purposes enumerated in this subdivision, and to reimburse the attorney-in-fact for any expenditures properly made by him in the execution of the powers conferred on the attorney-in-fact by the statutory short form power of attorney;

(5) to prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any benefits from military service or to intervene in any related action or proceeding;

(6) to hire, discharge, and compensate any attorney, accountant, expert witness, or other assistant when the attorney-in-fact deems that action to be desirable for the proper execution by the attorney-in-fact of any of the powers described in this subdivision; and

(7) in general, and in addition to all the specific acts listed in this subdivision, to do any other acts which the attorney-in-fact deems desirable or necessary, to assure to the principal, and to the dependents of the principal, the maximum possible benefit from the military service performed prior to or after the execution of the power of attorney by the principal or by any person related by blood or marraige to the principal.

All powers described in this subdivision are exercisable equally with respect to any benefits from military service existing at the giving of the power of attorney or accruing after that time, and whether accruing in the state of Minnesota or elsewhere.

1985 Annual North Carolina LAMP Conference

Major Mark E. Sullivan, USAR, Director of the Special Committee on Military Personnel of the North Carolina State Bar Association and a member of the American Bar Association's Standing Committee on Legal Assistance for Military Personnel, is currently planning the 1985 Annual North Carolina State Bar LAMP Conference.

The conference is designed for newly assigned legal assistance officers and those who have been serving in that capacity for a period of time. Presentations will include state law issues such as divorce, landlord/tenant problems, and consumer protection.

The conference is tentatively scheduled for late March or early April at Fort Bragg, North Carolina.

Legal Assistance Materials Distributed

Legal assistance offices on the worldwide mailing list should have received two tax publications mailed in January 1985: The Legal Assistance Officer's Federal Income Tax Supplement, produced by TJAGAS, and The All States Income Tax Guide, 1985 edition for 1984 returns, produced by the Air Force.

In addition, the following materials were mailed:

—The Consumer Information Catalog, Winter 1984-85 edition, which contains a list of free or relatively inexpensive publications which may be ordered from the Consumer Information Center, Pueblo, Colorado.

—A pamphlet entitled, "Renting in the Civilian Community," which was prepared by the

American Forces Information Service of the Department of Defense. This pamphlet contains useful information which can serve as the basis for preventive law articles, as well as waiting room fact sheets.

—A set of microfiche containing articles on various preventive law subjects prepared by the Air Force. Not all legal assistance offices received the set of microfiche; however, each staff judge advocate was sent a set separately. The articles on the microfiche can be used to prepare preventive law articles in installation newspapers or in staff judge advocate newsletters. If your office received a set of microfiche, you may want to share them with other SJA sections because they contain articles on criminal law and other administrative law topics in addition to legal assistance topics.

—LAMP Newsletter Number 21. This newsletter details LAMP Committee activities, contains an article on proving paternity, one on military malpractice case, and another describing LAMP individual and unit awards.

Guard and Reserve Affairs Items

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Distribution of The Army Lawyer and the Military Law Review

In the past, The Judge Advocate General's School distributed *The Army Lawyer* and the *Military Law Review* to USAR and ARNG judge advocates using a mailing list prepared and updated at the School. The School has automated the mailing list to insure accurate distribution of both publications. Addresses of USAR judge advocates residing in the continental United States are now provided to the School by ARPERCEN on a computer tape. The School cannot correct the tape. USAR judge advocates residing in CONUS should report changes of address by mail to Commander, US Army Reserve Personnel Center, ATTN: DARP-OPS-JA (MAJ Hamilton), 9700 Page Blvd, St. Louis, MO 63132-5260. *Do not send changes of address to The Army Lawyer or the Military Law Review.*

The addresses of ARNG judge advocates and USAR judge advocates who reside outside the continental United States are still maintained and updated at the School. Those judge advocates should continue to send changes of address to The Judge Advocate General's School, ATTN; JAGS-DDL, Charlottesville, VA 22903-1781.

All USAR and NG judge advocates should allow ninety days for a change of address to become effective.

TJAGSA Curriculum Changes

Officers enrolled in, or who contemplate enrollment in, either the Judge Advocate Officer Basic or Advanced Correspondence Courses through a United States Army Reserve (USAR) School are reminded of the effect of TJAGSA curriculum changes which took effect 1 December 1984.

As a result of these changes, common military subjects taught by USAR Schools in Phases I, III, and V no longer correspond to the subcourses taught in Phases I, III, and V of the correspondence course curriculum. While most subcourses offered by USAR Schools are identical to those offered in the correspondence course, the arrangement within phases may vary significantly, thus precluding the award of equivalent correspondence course credit for completion of Phases I, III, and V through USAR Schools. Instead, students will be credited for completion of individual USAR School subcourses which correspond to subcourses in Phase I, III, or V of the correspondence course

curriculum. The net loss to most students should be slight and all subcourses completed through USAR Schools continue to count for award of retirement points.

Any questions regarding Judge Advocate Officer Basic or Advanced Correspondence Courses should be directed to the TJAGSA Correspondence Course Office at Commercial (804) 293-4046 or FTS 938-1304.

Second Tour of Active Duty

If you desire a second tour of active duty in FY 85, you should contact Major Bate Hamilton, JAGC PMO at ARPERCEN, immediately. The JAGC has been tasked to provide JAGC officers to several installations in the United States to assist SJA offices during peak periods. These tours vary in length from two weeks to six months, and most of them will occur in the early spring and summer months. Locations and times are fixed, so flexibility will be limited. Priority will be given to IMA and Reinforcement Control Group officers; however, unit officers are eligible. If you are interested, contact Major Hamilton for additional information at (Toll Free) 1-800-325-4916, (Commercial) (314) 263-7698, or Autovon 693-7698.

Enlisted Update

Sergeant Major Walt Cybart

MILPERCEN Duty Hours

Duty hours for most of MILPERCEN, including the TJAG Liaison NCO at MILPERCEN, are 0630 to 1500 (Eastern Standard Time), except on Tuesdays which are 0630-1300. The telephone numbers are AV 221-6140 or (commercial (202) 325-6140). The correct mailing address for SFC Scarborough and SP6 Bridges, OTJAG Liaison NCOs at MILPERCEN is: Commander, US Army Military Personnel Center, ATTN: DAPC-EPM-A (SFC Scarborough/SP6 Bridges), 2461 Eisenhower Avenue, Alexandria, VA 22331-0400.

SQT

Several installations have received SQT alert notices for 1985 testing. If you receive a test notice for 1985, your local test control office should contact the SQT branch at Fort Benjamin Harrison, Indiana, for clarification. There will be no SQT for MOS 71D/71E during 1985.

Chief Legal NCO/Court Reporter Course

This course will be conducted at The Judge Advocate General's School during 10-14 June 1985. It is by invitation only; invitations will be mailed shortly. The course number is 512/71D/71E/40/50. Training funds, rather than office travel money, should be available for this year's course.

Video Tape

The video tape, "Authority of an NCO," SAVPIN number 701125-DA-DACN 33519, should be available at local TASC offices. The latest version has a short introduction by the Sergeant Major of the Army, Glenn Morrell. Earlier editions of this TV tape should be turned in or destroyed.

Professional Organizations

I have been contacted by several civilian organizations regarding the lack of membership applications from Army legal NCOs and court reporters. If you are interested in joining such an organization, please correspond directly to the one of your choice. Addresses are:

National Stenomask Verbatim
Reporters Association
159 Maplewood Estates
Scott Depot, West Virginia 25560

National Shorthand Reporters Association
118 Park Street
Vienna, VA 22180

Association of Legal Adminsitrators
1800 Pickwick Avenue
Glenview, Illinois 60025

CLE News

1. 10th Annual Homer Ferguson Conference

The 10th Annual Homer Ferguson Conference will be held at the George Washington University Marvin Center on 13 and 14 May 1985. Those interested in details of the Conference should contact Mr. Robert V. Miele, U.S. Court of Military Appeals, 450 E Street, N.W., Washington, D.C. 20443; telephone (202) 272-1454, 5.

2. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN; DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

3. TJAGSA CLE Course Schedule

April 2-5: JAG USAR Workshop.

April 8-12: 4th Contract Claims, Litigation, & Remedies Course (5F-F13).

April 8-June 14: 107th Basic Course (5-27-C20).

April 15-19: 78th Senior Officer Legal Orientation Course (5F-F1).

April 22-26: 15th Staff Judge Advocate Course (5F-F52).

April 29-May 10: 103d Contract Attorneys course (5F-F10).

May 6-10: 2nd Judge Advocate Operations Overseas (5F-F46).

May 13-17: 27th Federal Labor Relations Course (5F-F22).

May 20-24: 20th Fiscal Law Course (5F-F12).

May 28-June 14: 28th Military Judge Course (5F-F33).

June 3-7: 79th Senior Officer Legal Orientation Course (5F-F1).

June 11-14: Chief Legal Clerks Workshop (512-71D/71E/40/50).

June 17-28: JATT.

June 17-28: JAOAC: Phase VI.

July 8-12: 14th Law Office Management Course (7A-713A).

July 15-17: Professional Recruiting Training Seminar.

July 15-19: 30th Law of War Workshop (5F-F42).

July 22-26: U.S. Army Claims Service Training Seminar.

July 29-August 9: 104th Contract Attorneys Course (5F-F10).

August 5-May 21 1986: 34th Graduate Course (5-27-C22).

August 19-23: 9th Criminal Law New Developments Course (5F-F35).

August 26-30: 80th Senior Officer Legal Orientation Course (5F-F1).

4. Civilian Sponsored CLE Courses

June 1985

1: ATLA, Women in Litigation, Washington, D.C.

2-7: ATLA, Basic Trial Advocacy, Washington, D.C.

6: IICLE, Pension Planning, Springfield, IL.

6-7: PLI, Computer Software Protection & Marketing, New York, NY.

7: IICLE, Pension Planning, Chicago, IL.

7: PBI, Workers' Compensation, Philadelphia, PA.

12-14: PLI, Institute on Employment Law, New York, NY.

13-14: PLI, Commercial Real Estate Leases, San Francisco, CA.

13-14: PLI, Construction Contracts, Los Angeles, CA.
13-28: NCDA, Career Prosecutor Course, Houston, TX.
14: IICLE, State Income Taxation, Chicago, IL.
14: PBI, Workers' Compensation, Harrisburg, PA.
16-21: ALIABA/CLEW, Estate Planning in Depth, Madison, WI.
17-18: PLI, Employee Benefits Institute, San Francisco, CA.
20: MICLE, Construction & Financing a Commercial Property, Grand Rapids, MI.
20-21: PLI, Computer Software Protection & Marketing, San Francisco, CA.
21: IICLE, Administration of Simple Estate, Chicago, IL.
21-22: GICLE, Admiralty Law, Savannah, GA.
21-22: KCLE, Social Security Law, Lexington, KY.
24-28: ALIABA, Environmental Litigation, Boulder, CO.
28: IICLE, Administration of Simple Estate, Chicago, IL.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the January 1985 issue of *The Army Lawyer.*

5. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Montana*	1 April annually
Nevada	15 January annually
North Dakota	1 February in three year intervals
South Carolina	10 January annually
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

*On 1 February 1985, the Montana Board of Continuing Legal Education approved The Judge Advocate General's School's application for Accredited Sponsor status. All courses, resident and otherwise, taught by TJAGSA instructors have been approved for CLE credit.

For addresses and detailed information, see the January 1985 issue of The Army Lawyer.

Current Material of Interest

1. Professional Writing Award for 1984

Each year, the Alumni Association of The Judge Advocate General's Schol presents an award to the author of the best article published in the *Military Law Review* during the preceding calendar year. The award consists of a citation signed by The Judge Advocate General and an engraved plaque. The award is designed to acknowledge outstanding legal writing and to encourage others to add to the body of scholarly writing available to the military legal community.

The award for 1984 was presented to Major Thomas Frank England, JAGC, for his article, "The Active Guard/Reserve Program: A New Military Personnel Status," which appeared at

106 Mil. L. Rev. 1 (Fall 1984). The article, which had originally been submitted in fulfillment of the thesis elective in the 32d Judge Advocate Officer Graduate Course, traces the history of the development of the Active Guard/Reserve (AGR) Program and examines in detail the personnel and criminal law implications of the creation of such a status. In conclusion, Major England proposed specific changes to the Manual for Courts-Martial that would fully implement the criminal law jurisdiction over the AGR service member afforded by Article 3(a) of the Uniform Code of Military Justice.

Major England is currently assigned as the Officer-in-Charge of the Heilbronn Branch Office of the Office of the Staff Judge Advocate, VII Corps, Federal Republic of Germany. He has formerly served at III Corps, Fort Hood, Texas and in the Administrative Law Division of the Office of The Judge Advocate General.

2. Judge Advocates Association Writing Competition

The Judge Advocates Association sponsors an annual legal writing competition to foster professionalism and scholarly legal writing. The topic for the 1985 competition is "The Legal Limitations on the Authority of the President of the United States To Order First Use of Nuclear Weapons." Submissions should be in legal essay format, type-written, double-spaced, on one side of 8½" × 11" white paper, and in quadruplicate. Each entry shall have a title page bearing the words "Judge Advocates Association Annual Legal Writing Competition—1985," as well as the name, military title, service branch, and address of the submitter. The submission may not exceed 6000 words, excluding footnotes and bibliography. Footnotes and bibliography must be in standard legal citation format of publication quality.

The competition is open to all active duty, active Reserve, and National Guard judge advocates and legal officers, except Judge Advocates Association officers and directors. A prize of $250.00 and a recognition plaque will be awarded the winner. Additionally, a permanent trophy will be held for the year by The Judge Advocate General or Chief Counsel of the winner's service branch. Further, the winning entry will be submitted for publication in the winner's service law review.

All entrants from the Department of the Army must insure that their entries comply with the provisions of AR 360-5 and AR 600-50.

Entries should be mailed to the Judge Advocate Association, P.O. Box 2731, Arlington, VA 22202 and must be postmarked *not later than 30 April 1985.* The entries become the property of the Association and will not be returned.

3. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered, an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	TITLE
AD B086941	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-84-1 (150 pgs).
AD B086940	Criminal Law, Procedure, Trial/JAGS-ADC-84-2 (100 pgs).
AD B086939	Criminal Law, Procedure, Posttrial/JAGS-ADC-84-3 (80 pgs).
AD B086938	Criminal Law, Crimes & Defenses/JAGS-ADC-84-4 (180 pgs).
AD B086937	Criminal Law, Evidence/JAGS-ADC-84-5 (90 pgs).
AD B086936	Criminal Law, Constitutional Evidence/JAGS-ADC-84-6 (200 pgs).
AD B086935	Criminal Law, Index/JAGS-ADC-84-7 (75 pgs).
AD B078119	Contract Law, Contract Law Deskbook/JAGS-ADK-83-2 (360 pgs).
AD B078095	Fiscal Law Deskbook/JAGS-ADK-83-1 (230 pgs).
AD B079015	Adminsitrative and Civil Law, All States Guide to Garnishment Laws & Procedures/ JAGS-ADA-84-1 (266 pgs).
AD B077739	All States Consumer Law Guide/JAGS-ADA-83-1 (379 pgs).
AD B079729	LAO Federal Income Tax Supplement/JAGS-ADA-84-2 (188 pgs).
AD B077738	All States Will Guide/JAGS-ADA-83-2 (202 pgs).
AD B080900	All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
AD B087847	Claims Programmed Text/ JAGS-ADA-84-4 (119 pgs).
AD B087842	Environmental Law/JAGS-ADA-84-5 (176 pgs).
AD B087849	AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-84-6 (39 pgs).
AD B087848	Military Aid to Law Enforcement/JAGS-ADA-84-7 (76 pgs).
AD B087774	Government Information Practices/JAGS-ADA-84-8 (301 pgs).
AD B087746	Law of Military Installations/ JAGS-ADA-84-9 (268 pgs).
AD B087850	Defensive Federal Litigation/ JAGS-ADA-84-10 (252 pgs).
AD B087845	Law of Federal Employment/ JAGS-ADA-84-11 (339 pgs).
AD B087846	Law of Federal Labor-Management Relations JAGS-ADA-84-12 (321 pgs.)
AD B087745	Reports of Survey and Line of Duty Determination/JAGS-ADA-84-13 (78 pgs).
AD B086999	Operational Law Handbook/ JAGS-DD-84-1 (55 pgs).
AD B088204	Uniform System of Military Citation/JAGS-DD-84-2 (38 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx 75 pgs).

Those ordering publications are reminded that they are for government use only.

4. Regulations & Pamphlets

Number	Title	Change	Date
AR 190-30	Military Police Investigations	901	29 Nov 84
AR 195-6	Department of Army Polygraph Activities	901	29 Nov 84
UPDATE 3	All Ranks Personnel		1 Jan 85
UPDATE 3	Enlisted Ranks Personnel		15 Jan 85
DA Pam 550-48	Pakistan—A Country Study		10 Jan 85
DA Pam 550-72	Philippines—A Country Study		10 Jan 85

5. Articles

Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L. Rev. 227 (1984).

Althoff & Grieg, *Should VA Disability and Military Disability Pay Be Divided Upon Divorce?*, 11 Community Prop. J. 245 (1984).

Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433 (1984).

Cavin, *Federal Immunity of Government Contractors From State and Local Taxation: A Survey of Recent Decisions and Their Impact on Government Procurement Policies*, 61 Den. L.J. 797 (1984).

Cox, *"Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status*, 10 Brooklyn J. Int'l L. 333 (1984).

Feinberg, *Constraining "The Least Dangerous Branch": The Tradition of Attacks on Judicial Power*, 59 N.Y.U.L. Rev. 252 (1984).

Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 Nw. U.L. Rev. 1 (1984).

Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U.L. Rev. 482 (1984).

Hirsch & Mueller, *California's Determinate Sentencing Law: An Analysis of its Structure*, 10 New Eng. J. Crim. & Civ. Confinement 253 (1984).

Kaczynski, *From* O'Callahan *to* Chappell: *The Burger Court and the Military*, 18 U. Rich. L. Rev. 235 (1984).

Lintner, *Martial Property Rights and Conflict of Laws When Spouses Reside in Different States*, 11 Comr. nity Prop. J. 238 (1984).

MacFadden & Hirsch, *Professional License and Practice as Divisible Martial Property on Divorce*, 31 Med. Trial Tech. Q. 1 (1984).

Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 Cornell L. Rev. 38 (1984).

Nodiff, *Copyrightability of Works of the Federal and State Governments Under the 1976 Act*, 29 St. Louis U.L.J. 91 (1984).

Ragone, *The Applicability of Military Necessity in the Nuclear Age*, 16 N.Y.U.J. Int'l L. & Pol. 701 (1984).

Schlueter, *Judicial Federalsim and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59 Notre Dame L. Rev. 1079 (1984).

Sloan & Hall, *Confidentiality of Psycho-therapeutic Records*, 5 J. Legal Med. 435 (1984).

Weaver, *Judicial Interpretation of Administrative Regulations: The Deference Rule*, 45 U. Pitt. L. Rev. 587 (1984).

Comment, *Affirmative Action Programs: A Violation of a Union's Duty of Fair Representation*, 36 Baylor L. Rev. 155 (1984).

Comment, *International Law and Criminal Jurisdiction Over Visiting Armed Forces: Reconciling the Concurrent Jurisdiction Discontinuity*, 14 Cal. W. Int'l L.J. 351 (1984).

Comment, *The United States Action in Grenada: An Exercise in Realpolitik*, 16 U. Miami Inter-Am. L. Rev. 53 (1984).

Note, *National Security Information Disclosure Under the FOIA: The Need for Effective Judicial Enforcement*, 25 B.C.L. Rev. 611 (1984).

D.E. v. Department of the Navy, *A Refusal to Recognize a Presumption that Egregious Off-Duty Misconduct Adversely Affects the Efficiency of a Government Agency*, 14 Golden Gate U.L. Rev. 1 (1984).

Fourth Amendment Reform, 17 J.L. Reform 409 (1984).

The Religion Clauses, 72 Calif. L. Rev. 753 (1984).

United States v. Duncan: *The Prosecution of False Statements Made to Government Agents Under 18 USC § 1001*, 14 Golden Gate U.L. Rev. 87 (1984).

By Order of the Secretary of the Army:

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General, United States Army
Chief of Staff

Official:

DONALD J. DELANDRO
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